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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

IN RE:

JUDITH LYNN MADRID.

Debtor,

_____/

JUDITH LYNN MADRID,

Petitioner,

v.

LAWYERS TITLE INSURANCE CORP.
and DONALD TUPNEY,

Appellees.

_____/

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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43 pp

QUESTION PRESENTED FOR REVIEW

IS THE FORECLOSURE OF A DEED OF TRUST AND THE SALE OF PROPERTY SUBJECT TO THE LIEN WITHIN ONE YEAR OF THE FILING OF A PETITION IN BANKRUPTCY A "TRANSFER" UNDER THE PROVISIONS OF 11 U.S.C. §101(41) AND 11 U.S.C. §548(d)(1)

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IN THE SUPREME COURT OF THE UNITED STATES

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IN RE:

JUDITH LYNN MADRID,

Debtor,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITEDSTATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JUDITH LYNN MADRID,

Petitioner,

v.

LAWYERS TITLE INSURANCE CORP. and DONALD TURNEY,

Appellees.

_____/

Petitioner, Judith Lynn Madrid hereby petitions that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered February 13, 1984.

OPINION BELOW

The United States Bankruptcy Court opinion is reported at 10 B.R. 795 (BKRTCY. D. Nevada 1981) and is appended at App. A-32. The opinion of the United States Bankruptcy Appellate Panel is reported at 21 B.R. 424 (B.A.P. 9th Cir. 1982) and is appended at A-19. The opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is appended at APp. A-1.

JURISDICTION

This United States Court of Appeals for the Ninth Circuit entered judgment in the above-entitled cause of action on February 13, 1984. This Petition seeking determination and relief as provided in 28 U.S.C. Sec. 2106 is filed within ninety (90) days of the entry of the judgement in accordance with 28 U.S.C. Sec. 1254(1) and 28 U.S.C. Sec.

2102(c). The jurisdiction of this Court is conferred by 28 U.S.C. Sec. 1254 (1) to review an order or judgment of the United States Court of Appeals for the Ninth Circuit.

STATUTES INVOLVED

A. FEDERAL BANKRUPTCY STATUTES.

11 U.S.C. Sec. 101 DEFINITIONS

(41) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest. Pub.L.95-598, Nov. 6, 1978, 92 Stat. 2549; Pub.L. 97-222, § 1, July 27, 1982, 96 Stat. 235.

§ 548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor i property, or any obligation incurred by the debtor, that was made or

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incurred on or within one year before the date of the filing of the petition, if the debtor-

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer occurred or such obligation was incurred, indebted; or

(2) received less than a reasonable equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the

debtor in property, or any obligation incurred by the debtor, that was made or incurred within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or obligee of such a transfer or obligation that takes for value and in good faith has a lien on any interest transferred, may retain any lien transferred, or may enforce any obligation incurred, and the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the

commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

(2) In this section-

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor; and

(B) a commodity broker, forward contract merchant, stockbroker, or securities clearing agency that receives a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, takes for value to the extent of such payment. Pub.L. 95-598, Nov. 6, 1978, 92 Stat. 2600; Pub.L. 97-222, § 5, July 27, 1982, 96 Stat. 236.

§ 550. Liability of transferee of avoided transfer

(a) except as otherwise provide in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from-

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

(c) The trustee is entitled to only a single satisfaction under subsection (a) of this section.

(d)(1) A good faith transferee from whom the trustee may recover under subsection (a) of this section has a lien on the property recovered to secure the lesser of-

(A) the cost, to such transferee, of any improvement made after the transfer, less the amount of any profit realized by such transferee from such property; and

(B) any increase in value as a result of such improvement, of the property transferred.

(2) In this subsection, "improvement" includes-

(A) physical additions or changes to the property transferred;

(B) repairs to such property;

(C) payment of any tax on such property;

(D) payment of any debt secured by a lien against such property;

(E) discharge of any lien against such property that is superior or equal to the rights of the trustee; and

(F) preservation of such property;

(e) An action or proceeding under this section may not be commenced after the earlier of-

(1) one year after the avoidance of the transfer on account of which recovery under this section is sought; and

(2) the time the case is closed or dismissed.
Pub.L. 95-598, Nov. 6, 1978, 92 Stat.2601

B. NEVADA REVISED STATUTES

21.130 Notice of sale under execution. Before the sale of property on execution, notice thereof shall be given as follows:

(1) Perishable property. In cases of perishable property, by posting written notice of the time and place of sale in 3 public

places at the township or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property.

(2) Other personal property. In case of other personal property, by posting a similar notice in 3 public places of the township or city where the sale is to take place, not less than 5 nor more than 10 days before sale, and, in case of sale on execution issuing out of a district court, by the publication of a copy of the notice in a newspaper, if there by one in the court, at least twice, the first publication being not less than 10 days before date of sale.

(3) Real property. In case of real property, by personal service upon each judgment debtor or by registered mail to the last-known address of each judgment debtor and by posting a similar notice particularly describing the property, for 20 days successively, in 3 public places of township or city where the property is situated and also where the property is to be sold; and al[illegible]y publishing a copy of the notice three, times, once a week, for 3 successive weeks, in a newspaper, if there be one in the county. The cost of publication shall in no case exceed the rate for legal advertising as provided in NRS 238.070. In any

case where the paper authorized by this section to publish such notice of sale neglects or refuses from any cause to make such publication, then the posting of notices as provided in this section shall be deemed sufficient notice. Notices of the sale of property on execution upon a judgment for any sum less that $500, exclusive of costs, shall be given only by posting in 3 public places in the county, 1 of which shall be posted at the courthouse.
(1911 CPA § 348; A 1951, 153)-(NRS A 1965, 612; 1975, 651)

STANDARDS FOR CONDUCTING FORECLOSURE SALES: DEFICIENCY JUDGMENTS

40.451 "Indebtedness" defined. As used in N.R.S. 40.453 to 40.459, inclusive,"indebtedness" means the principal balance of the obligation secured by a mortgage or deed of trust, together with all interest accrued and unpaid prior to the time of sale, all costs and fees of such foreclosure sale, all advances made with respect to the property by the beneficiary, and all other amounts secured by the mortgage or deed of trust or which constitute a lien on the real property in favor of the person seeking the deficiency judgment. Such amount constituting a lien is limited to the amount of the consideration paid by lienholder.
(Added to NRS by 1969, 572)

40.453 Waiver of rights in documents relating to real property sales against public policy, unenforceable.

1. It is hereby declared by the legislature to be against public policy for any document relating to the sale of real property to contain any provision whereby a mortgagor or trustor waives any rights secured to him by the laws of this state.

2. No court shall enforce any such provision.
(Added to NRS by 1969, 573; A 1973, 911)

40.455 Deficiency judgment: Award to judgment creditor, beneficiary of deed of trust within 3 months from the date of the foreclosure sale or the trustee's sale held pursuant to NRS 107.080, respectively, an after the hearing conducted under NRS 40.457, the court may award a deficiency judgment to the judgment creditor of the beneficiary of the deed of trust if it appears from the sheriff's return or the recital of consideration in the trustee's deed that there is a deficiency of sale proceeds and a balance remaining due to the judgment creditor or the beneficiary of the deed of trust, respectively. (Added to NRS by 1969, 573; A 1979, 450)

40.457 Hearing prior to

award of deficiency judgment; appraisal of property sold.

1. Before awarding a deficiency judgment under NRS 40.455, the court shall hold a hearing and shall take evidence presented by either party concerning the fair market value of the property sold as of the date of foreclosure sale or trustee's sale. Notice of such hearing shall be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for hearing.

2. Upon application of any party made at least 10 days before the date set for the hearing the court shall, or upon its own motion the court may, appoint an appraiser to appraise the property sold as of the date of foreclosure sale or trustee's sale. SUch appraiser shall file with the clerk his appraisal, which is admissible in evidence. The appraiser shall take an oath that he has truly, honestly and impartially appraised the property to the best of his knowledge and ability. Any appraiser so appointed may be called and examined as a witness by any party or by the court. The court shall fix a reasonable compensation for the appraiser, but his fee shall not exceed similar fees for similar services in the

county where the encumbered land is situated.
(Added to NRS by 1969, 573)

40.459 Limitations on amount of money judgment. After the hearing under NRS 40.457, the court may award a money judgment against the defendant defendants personally liable for the debt. The court shall not render judgment for more than the amount by which the amount of indebtedness which was secured by the mortgage, deed of trust or other lien at the time of the foreclosure sale or trustee's sale, as the case may be, exceeded the fair market value of the property sold at the time of such sale, with interest from the date of such sale. In no event shall the court award such judgment, exclusive of interest after the date of such sale, in an amount exceeding the difference between the amount for which the property was actually sold at the foreclosure sale or trustee's sale and the amount of indebtedness which was secured by the mortgage, deed of trust or other lien at the time of such sale.
(Added to NRS by 1969, 573)

107.080 Trustee's power of sale: Notice of default and election to sell; deficiency in performance, payment; place of sale; no equity, right of redemption; shares of cooperative housing corporation.

1. Where any transfer in trust of any estate in real property is made after March 29, 1927, to secure the performance of an obligation or the payment of any debt, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation, for which such transfer is security.

2. The power of sale must not be exercised, however, until:

(a) In the case of any trust agreement coming into force on or after July 1, 1947, and before July 1, 1957, the grantor has for a period of 15 days, computed as prescribed in subsection 3, failed to make good his deficiency in performance or payment, and, in the case of any trust agreement coming into force on or after July 1, 1957 the grantor has for a period of 35 days, computed as prescribed in subsection 3, failed to make good his deficiency in performance or payment; and

(b) The beneficiary, the successor in interest of the beneficiary or the trustee shall first execute and cause to be recorded in the office of the recorder of the county wherein the trust property, or some part thereof, is situated a notice of such breach of his election to sell

or cause to be sold such property to satisfy the obligation; and

(c) Not less than 3 months have elapsed after the recording of such notice.

3. The 15- or 35-day period provided in paragraph (a) of subsection 2 commences on the first day following the day upon which the notice of default and election to sell is recorded in the office of the county recorder of the county in which the property is located and a copy of the notice of default and election to sell is mailed by certified mail with postage prepaid to the grantor or his successor in interest if known, otherwise to the address of the trust property. Such notice of default and election to sell must describe the deficiency in performance or payment and may contain a notice of intent to declare the entire unpaid balance due and payable if acceleration is permitted by the obligation secured by the deed of trust, but acceleration must not occur if the deficiency in performance or payment is made good and any costs, fees and expenses incident to the preparation or recordation of such notice and incident to the making good of the deficiency in performance or payment are paid within the time specified in subsection 2.

4. The trustee, or other person authorized to make the sale under the terms of the trust deed or transfer in trust, shall, after expiration of the 3-month period following the recording of notice of breach and election to sell, and prior to the making of such sale, give notice of the time and place thereof in the manner and for a time not less than that required by law for the sale or sales of real property upon execution. The sale itself may be made at the office of the trustee, if the notice so provided, whether the property so conveyed in trust is located within the same county as the office of the trustee or not.

5. Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser the title of the grantor without equity or right of redemption. The sale of a lease of a dwelling unit of a cooperative housing corporation vests in the purchaser title to the shares in the corporation which accompany the lease.
(Pat 1:173:1927; A 1949, 70; 1943 NCL §7710) - (NRS A 1957, 631; 1959, 10; 1061, 23; 1965, 611, 1242; 1967, 198; 1979, 708)

STATEMENT OF THE NATURE CASE

In September , 1979, Petitioner

purchased a residence at 1528 Debra Lane, Incline Village, Nevada from George G. Saure-Pulver Co. for the purchase price of $290,000.00. Petitioner paid $125,000.00 as a down payment to the Seller and executed a note secured by a deed of trust for the balance of $165,000.00. The $125,000.00 down payment was financed through Del Mar Commerce Company and was secured by a second deed of trust on the subject property. Respondent Lawyers Title Insurance Co., is the substituted trustee under this deed of trust.

Petitioner made improvements on the subject proeprty and by June 19, 1980 had reduced the principal amount owing on the second deed of $75,300.00.

Petitioner subsequently defaulted on the second deed of trust. After Notice of Default and Election to Sell and of Notice of Time of Place and Sell, pursuant

to Nevada State Law, Nev. Rev. Stat. Sec. 107.080 and 21.120 (1979), the property was sold at a trustee's sale by the Trustee under the second trust deed on January 9, 1981 to Respondent, Donald Turney. At the time of the sell, approximately $176,000.00 was due on the first trust deed and approximately $80,200.00 was due on the second trust deed. Turney paid the amount owing on the second trust deed plus one dollar.

Petitioner filed her petition under chapter 11 of Title 11 of the U.S. Bankruptcy Code on January 16, 1981.

The parties stipulated that Petitioner was rendered insolvent as a result of the sale. The Bankruptcy Court held that the foreclosure sale was voidable pursuant to 11 U.S.C. §548(a)(2). The Bankruptcy Appelate Panel for the Ninth Circuit reversed onthe grounds that

a non-collusive public sale is as a matter of law for the reasonably equivalent value of the property. The United States Court of Appeals for the Ninth Circuit affirmed the Bankruptcy Appellate Panel on different grounds, holding that under 11 U.S.C. §548(a)(2), the transfer of all interest of the Petitioner in the subject property occurred at the time of perfection of Petitioner;s second deed of trust.

Jurisdiction over the subject matter of this case exists and continues to exist in the United States Bankruptcy Court for the District of Nevada, pursuant to 11 U.S.C. §1471 and 1334, and the Emergency Rule issued by the United States Court of Appeals for the Ninth Circuit, adopted as Local Rule 118 of the Local Rules of Practice for the United States District Court, District of Nevada.

REASON FOR GRANTING THE WRIT

I. THIS CASE SHOULD BE REVIEWED BECAUSE OF THE CONFLICT IN THE CIRCUIT COURTS ON THE ISSUE OF WHETHER A TRUSTEE'S SALE IS A "TRANSFER" UNDER THE BANKRUPTCY CODE, AND BECAUSE THIS ISSUE IS IMPORTANT TO THE PROPER ADMINISTRATION AND APPLICATION OF THE BANKRUPTCY LAWS

A transfer is broadly defined at 11 U.S.C. §101(40) of the Bankruptcy Reform Act of 1978, (hereinafter the Code) as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an interest in property...(emphasis added)." This definition is at lwast as broad as under the former Bankruptcy Act, 2 Collier on Bankruptcy §101.41 (15th ed. 1981). In Re Madrid, 21 B.R. 424 (9th Cir. App. Pan. 1981) Volin B. J. dissenting. The former definition under §1 of the Act, 11 U.S.C. §1(30), defined a "transfer" as including:

> The sale and every other and different mode, direct or indirect, of disposing of as of partin with property or an interest therein or with the possession thereof...voluntarily or involuntarily, by or without judicial proceedings ...11 U.S.C. §1(30).

The breadth of the definition of a transfer under the Bankruptcy Code, 11 U.S.C. §101(41) (supp. IV 1980) is made clear by the House Report stating the following:

> A transfer is a disposition of an interest in property. The definition of transfer is as broad as possible. Many of the potentially limiting words in current law are deleted, and the language is simplified...Under this definition, any transfer of an interest in property is a transfer, including a transfer of possession, custody or control even if there is no transfer of title, because because possession, custody, and control are interests in property. H.R. Rep.No. 595, 95th Cong., 1st Sess. 314 (1977).

In the case of Durrett v. Washington National Insurance Co., 621

F.2d 201 (5th Cir. 1980), the United States Court of Appeals for the Fifth Circuit held that a non-judicial sale of real property under a deed of trust is a transfer within the meaning of §67(d) of the former Bankruptcy Act. The Fifth Circuit Court of Appeals specifically quoted from 1 Collier on Bankruptcy, §1.30 (14th ed. 1977) to note that the definition of "transfer" under the Bankruptcy Act "covers not only alienations of title but includes surrender of possession".

The United States Court of Appeals for the Fifth Circuit followed the Durrett, supra, decision in the per curiam opinion of that court in Abramson v. Lakewood Bank and Trust Co., F.2d 547 (5th Cir. 1981) cert. denial 454 U.S. 1164 (1982). The following Bankruptcy Courts have followed the Durrett decision and its

ineluctable conclusion as to the letter and the spirit of the law under 11 U.S.C. §548 of the Bankruptcy Code. Berge v. Sweet (In re Berge), 33 Bankr. 642 (Bankr. W.D. Wis. 1983); In re Ewing, 112 Bankr. L. Rep. (CCH) ¶69,460 (Bankr. W. D. Pa. Sept. 19, 1983); Bates v. Two Rivers Constr. (In Re Bates), 32 Bankr. 50 (Bankr. E.D. Cal. 1983); Richard v. Tempest, (In re Richard), 26 Bankr. 560 (Bankr. D.R.I. 1983); In re Richardson, 23 Bankr. 434 (Bankr. D. Utah 1983); Perdido Bay Country Club Estates, Inc. v. Equitable Trust Co. (In re Perdido Bay Country Club Estates, Inc.), 23 Bankr. 36 (Bankr. S.D. Fla. 1982); Coleman v. Home Sav. Ass'n. (In re Coleman, 21 Bankr. 832 (Bankr. S. D. Tex. 1982); Smith v. American Consumer Fin. Corp., (In re Georgia Mae Smith), 21 Bankr. 345 (Bankr. M.D. Fla. 1982); Cooper v. Smith (In re

Connie Dale Smith), 24 Bankr. 19 (Bankr. W. D. N. C. 1982); Home Life Ins. Co. v. Jones (In re Jones), 20 Bankr. 988 (Bankr.E.D. Pa. 1982); Wickham v. United Am. Bank (In re Thompson), 18 Bankr. 67 (Bankr. E.D. Tenn. 1982); Marshall v. Spindale Sav. & Loan Ass'n (In re Marshall), 15 Bankr. 738 (Bankr. W.D.N.C. 1982).

Durrett, supra, has been referred to as the first case in which a bankruptcy court has held void, as a fraudulent transfer, a foreclosure sale of real property valid under state law, because the sale occurred within one year of the filing of the petition in bankruptcy. See Abramson v. Lakewood Bank and Trust Co., 647 F.2d 547, 550 (5th Cir. 1981) dissenting opinion of Clark C. J. Nonetheless, it is clearly not the first case where involuntary transfers from a

judicial or sheriff's sale or court order have been found to be "transfers" under bankruptcy law. See Adler v. Greenfield, 88 F.2d 955 (2nd Cir. 1936); Wolf v. Aero Factors Corp., 126 F. Supp. 872 (S.D.N.Y. 1954); Britt v. Damson, 334 F.2d 894 (9th Cir. 1964); Lefkowitz v. Finkelstein Trading Corp., 14 F. Supp. 898 (S.D.N.Y. 1936). Indeed, an early treatise on this subject noted that foreclosures of mortgages and execution upon judicial liens may constitute a fraudulent conveyance. I Glenn, Fraudulent Conveyances and Preferences, Sections 214 a and 214 b (1940). See also, Johnson v. Waters, 111 U.S. 640, 4 S. Ct. 619, 28 L.Ed. 547 (1884).

In Adler v. Greenfield, supra, the Second Circuit Court of Appeals held that a judicial sale of drugstore fixtures after a default judgment was a transfer

and voidable as a preference. The Ninth Circuit held in Britt v. Damson, supra, that a Washington divorce court judgment may be a fraudulent conveyance depending upon whether the Debtor, the former husband of the Defendant, was deprived of a possessory interest in property, and reversed a summary judgment for the former wife.

It is submitted that the holding of the U.S. Court of Appeals for the Ninth Circuit in this case is an improper interpretation of the specific language of 11 U.S.C. §548(d) by the fusion of two separate transfers which are, of course, the initial transfer of the lien or trust deed and the subsequent transfer of the Debtor's right to possession and equity. See, In Re Madrid, 21 B.R. 424, 428 (Volenn, B.J. dissenting); Gillman v. Preston Family Investment Co., (In Re

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Richardson) 23 B.R. 434 (Bkrtcy D. Utah 1982). Under Nevada law a mortgagor under a mortgage[1] or a trustor under a deed of trust[2] retains the right of possession until consumation of a foreclosure sale.

As stated by the Bankruptcy Court in the case of In re Richardson, supra,:

> Under §548(d)(1), a transfer challenged under §548(a) is made when it "becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition." In this case, §548(d)
>
> (1) deems the transfer of the debtors' equity to Preston to have been made when it was so far perfected that a bona fide purchaser from the debtors' could not acquire an interest in the debtor's equity superior to Preston's interest.

> Under Utah law the transfer to Preston was so far perfected that a subsequent purchaser from the debtor could not acquire an interest in the debtors' equity superior to Preston's interest after the sale, when a purchaser, based on the notice of default and the notice of sale, could have discovered the sale. Thus, the transfer was made within one year before the date of the filing of the debtors' petition. (emphasis added) id. at 445.

The Durrett rule, which recognizes that a bona fide purchaser can obtain the right to possession and equity until the time of the foreclosure sale or, at least, until notice of default under state law, see Nev. Rev. Stat. 107.080, is clearly correct. The Ninth Circuit Court of Appeals in this case relied upon its decision in Glessner v. Massey - Ferguson, Inc., 353, F.2d 986 (9th Cir. 1965), cert.denial 384 U.S. 970 (1966) in holding that a foreclosure sale is not a transfer. Glessner v. Massey-Ferguson,

supra, was an action brought to set aside a repossession of equipment as a preference under §60(a)(2) of the former Bankruptcy Act which provided a judgment lien creditor test to determine the time of perfection of a transfer. See, 11 U.S.C. §547(e)(1)(B); 4 Collier on Bankruptcy §547.46 (15th ed. 1983).

The holding of the Ninth Circuit Court in this case ignores the fundamental distinction between the rights obtainable by a bona fide purchaser as compared to a judgment lien creditor in determining the time of perfection of a transfer. Kennedy, Secured Creditor Under The Bankruptcy Reform Act, 15 Indiana L. Rev. 477, 484 (1982). A bona fide purchaser can acquire certain rights superior to a mortgagee or a beneficiary under a trust deed prior to foreclosure, including the mortgagor's or trustor's

right to possession and equity.

This distinction in regard to §60 (a), concerning preferences, and §67(d), concerning fraudulent transfers, under the former Act was intended by Congress and is retained in the current Code. As noted in 4 Colliers on Bankruptcy, Section 548.08 (15th ed. 1981):

> In consequence the provisions for determining the time limitations applicable to preferential transfers in former Sections 3b and 60 became quite distinct from those prescribing the time limitations for fraudulent transfers under former Sections 3b and 67d...
>
> Former Section 67d(5) fixed the time when a transfer was deemed to have been made in computing the applicable limitation in former Section 57d. The time did not start to run until the transfer had been so far perfected that no bona fide purchaser from the debtor could thereafter acquire <u>any rights superior to those of the transferee in the property</u>. That is to say, when the parties to the transfer have done

> everything in the way of recording or giving and taking in possession or otherwise fulfilling the requirements to state law for the transfer to be good against bona fide purchasers persons dealing subsequently with the transferor, then it was deemed to be made for the purposes of commencing to compute time under former Section 67d. (emphasis added).

The holding of the Ninth Circuit in this case is irreconciliable with the definition of a "transfer" under 11 U.S.C. §101(40) including all dispositions of property, whether voluntary or involuntary and that a change of possession is a transfer.

At issue in this case is the role of a federal courts in the interpretation of bankruptcy law. As noted by this Court in Central Trust Company v. Official Creditors Committee of Geiger Enterprises, Inc., 454 U.S. 354, 359, 360, 364, 70 L.E.d. 2d 542, 548, 102 S. Ct. 695 (1982).

> "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms". Caminetti v.United States, 242 US 470, 485, 61 L. Ed 442, 37 S Ct. 192 (1917). While the Court of Appeals may have reached a practical result, it was a result inconsistent with the unambiguous language used by Congress.

Moreover, the decision of the Ninth Circuit in this case concerning an important question of federal law fails to consider the fundamental policies of the very laws in question. As noted by this Court in Sampson v. Imperial Paper and Color Corp., 313 U.S. 215, 219 (1941), "the theme of the Bankruptcy Act is equality of distribution." This purpose applies to the avoiding powers of a trustee as well. See A Survey of the

Fraudulent Conveyance in Bankruptcy, 17 Vanderbilt L. Rev. 381 (1964). Obviously, this policy is frustrated by foreclosure sales which often times result in a sale at an inadequate price depriving the debtor of his equity in the property. Washburn, the Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 So. Cal. L. Rev. 843, 850 (1980).

The policy favoring distribution to all creditors is, of course, most pronounced and effectuated in a reorganization proceeding. See United States v. Whiting Pools, 103 S. Ct. 2309 (1983). The Durrett rule would clearly enhance the likelihood of successful reorganizations by the Debtor regaining his equity in the property. The Durrett decision is in accordance with well-established principles of law concerning

fraudulent transfers as applied to the constructive fraud provisions of 11 U.S.C. §548(a)(2). Moreover, the Durrett rule "is properly sensitive to the policy underlying §548 that the debtor not alienate its equity in its property for less than reasonably equivalent value". Alden, Gross and Borowitz, Real Property Foreclosure as a Fraudulent Conveyance, 38 Bus. Law. 1605, 1610 (1983).

CONCLUSION

In the interests of assuring effective enforcement and application of the federal bankruptcy laws, and in the insurance of even-handed administration of justice in furtherance of the primary purposes of bankruptcy legislation, the Petitioner respectfully requests that this Court grant Petitioner's Petition for a Writ of Certiorari and set this case for full argument.

Respectfully Submitted:

MILLER & DAAR

By: _____
VERNON E. LEVERTY, ESQ.

By: _____
VICTOR M. PERRI, ESQ.

CERTIFICATE OF MAILING

I am an employee of the law firm of Miller & Daar of 832 Willow Street, Reno, Nevada 89502. On the date below written I served the within documents by placing a true copy thereof in the United States mail with postage thereon fully prepaid in the mail at Reno, Nevada addressed as follows:

Timothy J. Henderson, Esq.
Henderson, Nelson & Moschetti
164 Hubbard Way, Suite B
Reno, Nevada 89502

Executed this 20th day of June, 1984.

I declare under penalty of perjury that the foregoing is true and correct.

_____
EVELYN S. BORBE

---

[1] Fair v. Howard, 6 Nev. 304 (1871); Bordon v. Clow, 21 Nev. 275 30P. 821 (1892), cited Crumbaker v. Kelly, 95 Nev. 743, 745, 601 P.2d 1199 (1979).

[2] This rule as to trust deeds is the rule in California, see Sacramento Bank v. Alcon 53 P. 813, 121 Cal. 379 (Calif. 1898); Osborne, Nelson and Whitman, Real Estate Financing Law, §4.2 P.120 n. 27 (est ed. 1979) and cases cited therein. Nevada law is assured by the same. See Golden v. Tomiyasu, 387 P.2d 889, 996, 997 (Nevada 1963). See also, McMillan v. United Mortgage Co., 412 P.2d 604 (Nev. 1966); Keever v. Nicholas Beers Co., 611 P.2d 1079 (Nev. 1980) following California interpretation of one action rule.

83-2107

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

IN RE:

JUDITH LYNN MADRID,

Debtor,

_____/

JUDITH LYNN MADRID,

Petitioner,

v.

LAWYERS TITLE INSURANCE CORP.
and DONALD TURNEY,

Appellees.

_____/

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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86 pp

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE:

JUDITH LYNNE MADRID,

Debtor.

No. 82-4433
BAP #NV 81-1106,
81-00038

JUDITH LYNNE MADRID,

Appellant,

vs.

LAWYERS TITLE INSURANCE CORP., and DONALD TURNEY,

Appellees.

Appeal from the United States Bankruptcy Appellate Panel of the Ninth Circuit
Hughes, Volinn and Elliott, Bankruptcy Judges, Presiding
Argued and submitted February 18, 1983

before: GOODWIN, TANG and FARRIS, Circuit Judges.

TANG, Circuit Judge:

The sole question before us is whether the nonjudicial foreclosure sale

of appellant's home may be set aside under 11 U.S.C. § 548(a) of the Bankruptcy Code. The Bankruptcy Court set aside the sale, finding that a "transfer" occurred at the foreclosure and that less than reasonably equivalent value was paid to the debtor. The bankruptcy Appellate Panel reversed, holding that reasonably equivalent value is paid as a matter of law when there is a regularly conducted foreclosure sale.

We agree that the foreclosure sale cannot be set aside, but do not base our holding on the question of reasonably equivalent value. We hold that the sale must be upheld because the transfer of the home occurred at the time of perfection of the trust deed, not upon foreclosure.

BACKGROUND

In September, 1979, Judith Madrid

purchased a home near Lake Tahoe, Nevada for $290,000. Madrid made a $125,000 down payment and executed a one-year note, secured by a first deed of trust on the residence, for the balance of $165,000. The $125,000 down payment was financed through Del Mar Commerce Company and secured by a second deed of trust on the same property. Appellee, Lawyers Title Insurance Corporation, is the substituted trustee under the second deed.

Madrid subsequently defaulted on payments due under both deeds. Pursuant to Nevada state law, Nev. Rev. State. § 107.080 and 21.130 (1979) and provisions in the second deed of trust, the trustee commenced foreclosure proceedings on the second deed. After proper notice and publication, the property was sold on January 9, 1981, at

a nonjudicial foreclosure sale to appellee, Donald Turney. Turney is in the business of buying and selling foreclosure properties. At the time of sale, approximately $176,000 was due on the first deed, and approximately $80,200 was due on the second deed. Turney, the sole bidder, paid the amount due on the second deed plus one dollar. He took the property subject to the first deed, which was also in the process of foreclosure.

On January 16, 1981, seven days after the foreclosure sale, Madrid filed a petition for reorganization under Chapter XI of the Bankruptcy Code. Madrid, as a debtor-in-possession, then brought an action in bankruptcy court to set aside the sale as a fraudulent conveyance under 11 U.S.C. § 548 (a)(2)(A) & (B)(i), which states:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year or before the date of the filing of the petition, if the debtor-

(2)(A) received less than a reasonably equivalent value in exchange for such transfer of obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

The parties agreed that Madrid met the insolvency requirement of § 548(a)(2)(B)(i). Thus, the question addressed by the courts below was whether there had been a transfer of Madrid's property interest within one year prior to filing of the Chapter XI petition, for which Madrid received less than a reasonably equivalent value.

The bankruptcy court agreed with

Madrid that the sale should be set aside as a fraudulent conveyance. The court found, without discussion, that a nonjudicial foreclosure sale constituted a transfer under 11 U.S.C. § 101 (41), albeit an involuntary transfer. The bankruptcy court then set aside the sale, concluding that the reasonably equivalent value requirement of § 548(a)(2)(A) had not been met.

The Bankruptcy Appellate Panel reversed the bankruptcy court. The Panel held that the consideration received at a noncollusive and regularly conducted nonjudicial foreclosure sale satisfied the reasonably value requirement of § 548(a)(2)(A) as a matter of law, and thus the sale could not be set aside. Although the Panel failed to address the transfer issue, it apparently assumed

that the sale constituted a transfer under § 548(a).

ANALYSIS

Since the Bankrutpcy Appellate Panel's conclusion rests on a question of law, it is subject to independent review by this court. Lama Co. v. Union Bank, 315 F. 2d 750, 752 (9th Cir. 1963). While we agree with the Panel that the sale should not be set aside under § 548(a)(2)(A), we base our reasoning on different legal principles.

We conclude that the foreclosure sale was not a transfer under § 548(a), and do not decide whether the amount paid at foreclosure was a reasonably equivalent value. For reasons that follow, we hold that the transfer of Madrid's property interest under § 548(a)(2)(A) occurred at the time the second deed of trust was perfected under

Nevada law. That transfer was carried out more than one year prior to filing of the bankruptcy petition. Thus, the transfer was not voidable as a § 548(a)(2)(A) fraudulent conveyance.

Arguments of the Parties

Madrid's § 548 petition seeks to avoid and set aside the allegedly fraudulent transfer of her equity interest in the residence. Yet before Madrid may avail herself of the relief provided under § 548(a), she must demonstrate that there has been a transfer of the residence within one year prior to filing of the bankruptcy petition. She alleges that such a transfer occurred at the nonjudicial foreclosure sale. Appellees, however, take the position that the only transfer that has taken place is the transfer at the perfection of the trust deed. They

argue that the trust deed was perfected more than a year prior to the filing of the bankruptcy petition, and is thus not subject to avoidance as a fraudulent conveyance. See In re Alsop, 145 Bank. 982 (Bank. Alaska 1981), aff'd, 22 Bankr. 1017 (D. Alaska 1982).[1/] We agree with the latter contention.

Historical Review

The modern law of fraudulent conveyance finds its origins in the 1570 English enactment of 13 Eliz., ch.5. See 4 Collier, Collier on Bankruptcy, § 67.29(1) (14th ed. 1978); 4 H. Remington, Remington on Bankruptcy, § 1638 (rev. ed. 1957). The statute was passed for the protection of creditors, and gave the creditors, inter alia, the power to avoid conveyances and transfers made with the intent and purpose to hinder, delay or defraud creditors. The American

codification of this bankruptcy law was set forth in the Bankruptcy Act of 1898. A review of § 67e of the 1898 Act demonstrates that it dealt only with conveyances made with actual intent to defraud.

The Chandler Act of 1938 replaced § 67e with § 67d. The 1938 Act expanded the law of fraudulent conveyances by creating "constructive fraudulent conveyances". This expansion permitted the setting aside of conveyances made by a debtor without fair consideration, regardless of the debtor's actual intent. 1 U.S.C. § 67d(2)(a-c). The most recent codification of the fraudulent conveyance statute is § 548(a)(2)(A) & (B)(i).

In our short historical review of the fraudulent conveyance statutes we have found no evidence that the lineal ancestors of § 548(a)(2) were to be used

to attack a secured creditor's enforcement of a lien as a constructive fraudulent conveyance. These statutes instead provide authority for the proposition that conveyances are set aside when there is actual fraud or a situation indicative fraud, such as the transfer of property for less than reasonable equivalence.

Legislative History

The statutory development of time of transfer for § 548 purposes underscores the conclusion that the enforcement of a valid lien was not intended to be covered by § 548. The first appearance of a section pinpointing time of transfer for fraudulent conveyance purposes was in § 67d of the 1938 Chandler Act. That section read:

> For the purposes of this subdivision d, a transfer shall be deemed to have been

> made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior the filing of the petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of such petition.

11 U.S.C. § 67d(5)(repealed 1978). This formula for determining time of transfer remains significantly unchanged in Code § 548(d)(1). The Uniform Fraudulent Conveyance Act, progenitor of the constructive fraudulent conveyance statutes, contained no comparable provision defining time of transfer. This raises the question why Congress added such a provision.

The answer lies in the legislative history, which demonstrates that by defining transfer fraudulent conveyance

purposes in terms of time of perfection, Congress effected two purposes: (1) time of perfection served as the pivotal point in computing the reach-back period during which the bankruptcy trustee could set aside fraudulent conveyances; and (2) a secret, i.e., unperfected transfer would not escape the trustee's avoidance powers by the trustee's failure to attach it with the reach-back period, since an unperfected transfer was not deemed a transfer for § 67d purposes. See H.R. Rep. No. 1409, 75th Cong., 1st Sess. 31-34 (1937). Again, the workings of Congress display no intent to treat lien enforcement activities as constructive fraudulent conveyances.

Time of Perfection

The question of whether a particular occurrence is a transfer for bankruptcy purposes is a matter of

federal characterization. McKenzie v. Irving Trust Co., 323 U.S. 365, 369--70 (1945). State law, in turn, supplies the determination of the time and method of perfection. See id.; Evans v. Valley West Shopping Center, Inc., 567 F. 2d 358, 360 (9th Cir. 1978) (per curiam).

For purposes of § 548(a)(2), a transfer occurred when Del Mar's security interest in Madrid's residence was perfected under Nevada law. The security interest took the form of a second deed of trust, and under Nevada law perfection of a deed of trust occurs upon proper execution and recordation. Nev. Rev. Stat. § 111.353; Aladdin Heating Corp. v. Trustees of Central States, 93 Nev. 257, ___, 563 P.2d 82, 83, 86. In this case, perfection of the second deed of trust occurred more than one year prior to the filing of the bankruptcy petition.

Therefore, the transfer is not subject to attack under § 548.[2/]

Ninth Circuit Precedent

Our holding is consonant with prior Ninth Circuit decisions. See Britt v. Damson, 334 F.2d 896 (9th Cir. 1964), cert denied, 379 U.S. 966 (1965); Glessner v. Massey-Ferguson, Inc., 353 F.2d 986 (9th Cir. 1965), cert. denied, 384 U.S. 970 (1966). Britt involved a trustee's suit against the bankrupt's former wife to set aside as a fraudulent transfer a community property award made to the wife in prior divorce proceedings. We agreed with the trustee that the bankrupt previously held joint possession of the community property, and as to the part awarded to his wife, he lost possession and thus suffered a transfer for § 67d(2) purposes. Britt, however, did not involve a valid, pre-existing

lien; the only activities which constituted a transfer in Britt occurred at the time of the award in the divorce proceedings.

This distinguishing fact is highlighted by Glessner v. Massey-Ferguson, Inc., 353 F.2d 986. In Glessner the debtor signed a contract of conditional sale which was not filed by the creditor. The contract reserved title in the seller until full payment of the purchase price. Upon default, the creditor repossessed the subject property. Two months later, the debtor filed bankruptcy. We agreed that the repossession of the property was a preferential transfer under § 60a(2) of the Act. The reason the repossession constituted a transfer, however, was because the creditor had failed to file the contract for public record as

required by Arizona statute; otherwise, had the security interest been properly recorded, the transfer for § 60a(2) purposes would have occurred at the time the contract was perfected by recordation. Id. at 992. The result reached in Glessner is consistent with the result reached herein.

Fifth Circuit Precedent

Madrid's position that the non-judicial foreclosure constituted a transfer finds some support in Durrett v. Washington Nat'l Ins. Co., 621 F.2d 201 (5th Cir. 1980). In this case the Fifth Circuit held that under Bankruptcy Act § 67d (comparable to Code § 548(a)), a transfer occurs at a foreclosure sale. In reaching its conclusion, however, the court relied on the extremely broad definition of transfer set out in 11 U.S.C.§ 1(30) of the Bankruptcy Act:

> "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.

If we were to apply this definition to the case at bar, we would be ignoring the applicable, narrower definition of transfer set out in § 548(d)(1). See In re Alsop, 14 Bankr. at 986 ("Although the transaction that occurred at the foreclosure sale might, standing alone, satisfy the definition of transfer of 101(40), that definition does not stand alone in § 548."). We also agree with

the dissent in Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547, 549-50 (5th Cir. 1981) that a foreclosure sale is not a transfer by a debtor, as required under § 67(d) now § 548(a)) of the Act, but rather is an involuntary conveyance triggered by the debtor's failure to fulfill some obligation in the promissory note secured by a mortgage or deed of trust. For the above reasons, as well as the other grounds set out in our opinion, we reject the reasoning of Durrett.

Policy Considerations

In the case at bar, Madrid seeks to create a de facto redemption right to obtain real property previously sold at foreclosure proceedings. Appellees and amici argue, and we agree, that creating such a redemption right under bankruptcy laws will adversely affect commercial and real estate laws, long within the domain

of the states. Creating a federal de facto right of redemption under the bankruptcy laws is clearly contrary to nevada real property law. See, e.g., Nevada Land and Mortgage Co. v. Hidden Wells Ranch, Inc., 83 Nev. 501, ___, 435 P.2d 198, 200-201 (1967); Golden v. Tomiyasu, 79 Nev. 503, ___, 387 P.2d 989, 996-97 (1963), cert. denied, 382 U.S. 844 (1965).

We also agree with appellees and amici that creation of a de facto right of redemption would significantly chill participation at foreclosure sales, where sale prices - not subject to the usual economic competitive forces -already are frequently lower than the actual value of the property sold. See In re Alsop, 14 Bankr. at 987-88. Negative repercussions would also be likely in the lending arena, where creditors would be less

willing to lend funds on the security of a mortgage or deed of trust. No support for this drastic upset of state laws and procedures is found in the Bankruptcy Code.

Alternative Remedies Available to Debtor and Creditors

Finally, we point out that the harmful and disruptive rule which Madrid urges this court to adopt is not necessary to protect debtors or to preserve the assets of their estates for creditors. First, ample protections were afforded Madrid under Nevada's statutory system prior to the actual time of the foreclosure sale. See Nev. Rev. Stat. § 107.080, 21.130 (1979). Second, if the debtor is unable or unwilling to pursue state statutory methods to protect his or her equity during the notice period, a voluntary bankruptcy petition, then

creditors may file an involuntary petition under § 303 of the Code which would also stay the foreclosure sale. 11 U.S.C. § 303.

If bankruptcy is filed prior to foreclosure, the debtor and the unsecured creditors have a variety of protections under the Bankruptcy Code to capture any equity in the property, subject to providing adequate protection to the secured creditor. The debtor-in-possession (if a Chapter XI or XIII is filed) could repay the indebtness secured by the trust deed being foreclosed over a period of time as part of a Chapter XI or XIII plan, and thereby retain the possession and use of the property. 11 U.S.C. §§ 363, 1129, 1325. The debtor may borrow against the property to draw out the equity, and impose a lien upon the property to secure that borrowing.

11 U.S.C. § 364.

When the foreclosure sale is completed prior to bankruptcy petition filing, the debtor's options are admittedly more limited. Attacks have been made under numerous theories with varying degrees of success. See, e.g., In re Jones, 20 Bankr. 988, 990-91 (Bankr. E.D. Pa. 1982) (property subject to automatic stay of §362(a) since debtor retained some interest in property for period of time following foreclosure; therefore, sale set aside as a §549(a) post-petition transfer); In re Castillo, 3 Collier Bankr. Cas. 2d (MB) 351, 355 (Bankr. S.D.N.Y. 1980) (§ 510(c) equitable subordination attack available where secured creditor engages in inequitable conduct); In re Jordan, 2 Collier Bankr. Cas. 2d (MB) 635, 636-37

(Bankr. N.J. 1980) (preferential transfer attack made under §547). Whatever the merits of these challenges, we do not add to the arsenal of bankruptcy powers the right to avoid a non-judicial, regularly conducted foreclosure sale of real property.

Conclusion

We are reminded that the purposes of the Bankruptcy Code are either to "rehabilitate financially a distressed debtor or to assemble and liquidate his assets for distribution to creditors." H. R. Rep. No. 595, 95th Cong., 1st Sess. 10, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 5971 (footnotes omitted). To this end, Congress has been explicit about the underlying theme operational in a bankruptcy setting:

> In either kind of proceeding, the nature of bankruptcy is to sort out all of the debtor's legal relationships with others,

> and to apply the principles and rules of the bankruptcy laws to those relationships. Bankruptcy is mainly a procedural device, prescribing the method of accomplishing rehabilitation or liquidation, but generally leaving undisturbed legal relationships that existed before bankruptcy.

Id.

The legal relationship between debtor and secured creditor is a long-recognized and well-established one in the history of English and American jurisprudence. We find no Congressional intent to upset this relationship in the §548(a)(2) context presented herein. For the reasons stated above, the holding of the Bankruptcy Appellate Panel is

AFFIRMED.

FOOTNOTES

1/ Alternatively, appellees argue that even if a second transfer occurred at the time of foreclosure, when Madrid's equity in the property was transferred to the purchaser, Nevada state law dictates that the title of the purchaser at a foreclosure sale relates back to the time of the execution of the deed of trust. See, Aladdin Heating Corp. v. Trustees of Central States, 93 Nev. 257, _____ __, 563 P.2d 82, 86 (1977); Erickson Constr. Co. v. Nevada National Bank, 89 supra, 14 Bankr. at 986. As we hold that a transfer under §548(a) does not occur at time of foreclosure, we do not base our holding on the relation back doctrine.

2/ Our holding is in accord with cases decided under the preferential transfer section of the Bankruptcy Code (current Code §547; former § 60a of the Act). The principle running throughout those cases is that enforcement of a valid lien within four months of bankruptcy petition filing cannot be struck down as a preferential transfer where the lien was perfected outside the four-month reach back period. No matter what enforcement mechanism was employed, transfer for purposes of the preferential transfer section occurred at time of perfection of the lien, and not at time of enforcement. See e.g., Evans v. Valley West Shopping Center, Inc., 567 F.2d 358, 360 (9th Cir. 1978) (per curiam); Dubay v. Williams, 417 F.2d

1277, 1287-88 (9th Cir. 1969); Clements v. Snider, 409 F.2d 549, 551 (9th Cir. 1969)

In re: Madrid v. Lawyers Title Insurance Corp., No. 82-4433

FARRIS, Circuit Judge, concurring:

I agree with the majority that the non-judicial foreclosure sale of Madrid's home was not a voidable transfer, but our reasons for the result differ. Madrid seeks to set aside the sale as a fraudulent conveyance under 11 U.S.C.§548. Section 548 forbids two kinds of fraudulent transfers, those with intent to defraud and those where no intent need be shown because the inadequacy of consideration leads to an irrebutable presumption of fraud. Madrid proceeds under the second theory, contained in the following portions of §548:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date

> of the filing of the petition, if the debtor--.
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or become insolvent as a result of such transfer or obligation.

The problem with Madrid's argument is that she did not transfer the property. After she defaulted, the foreclosure proceeded without her participation or consent. I recognize that the definition of "transfer" at 11 U.S.C. §101(41) (West Supp. 1983) included "involuntary" transfers, but §548 permits the trustees to set aside a transfer "if the debtor. . . received less than a reasonably equivalent value" (emphasis added). This language contemplates that the debtor was the seller or otherwise

participated in the transaction.

The power to set aside transfers for less than "reasonably equivalent value" is an outgrowth of the prohibition against fraudulent conveyances by debtors. Congress created an irrebutable presumption of fraud in certain cases of insufficient consideration. One cannot presume fraud by the debtor in a transaction where the debtor was not a party. Section 67(d) of the prior Bankruptcy Act, virtually identical in all substantive respects to the present §548, applied only to "transfers made....by debtors". If the language of §548 does not reflect the debtor's active role as clearly as that of its predecessor, the purpose and origin of the present statute give clarity of meaning to phrases that might otherwise be ambiguous. I would therefore hold

that only transfers where the bankrupt was a participant can be set aside for absence of "reasonably equivalent value. "1/

The majority opinion would also find no voidable transfer here. It states that the transfer occurred when Madrid signed the deed of trust 15 months before filing for bankruptcy. Section 548 does not permit the trustee to set aside transfers made more than one year before filing for bankruptcy. The flaw in this approach is its assumption that there can be only one transfer. The debtor who gives a creditor a security interest in his property--a transfer for §548 purposes if the security interest is sufficiently perfected under §548(d)(1)--often retains an interest in the property, such

as possession, that can be transferred at a later date. As I understand the majority's rationale, such subsequent transfers would not be covered, even if effected with actual intent to defraud. Section 548(d)(1), relied upon by the majority, does not support the "one transfer" rule. That section addresses the problem of secret transfers by refusing to recognize transfers that are not sufficiently open to be valid against bona fide purchasers.

The majority's rationale sweeps more broadly than I believe necessary or desirable. I would hold that §548 cannot be used to set aside transfers where the debtor was not a participant. I agree that we should affirm the bankruptcy appellate panel.

FOOTNOTES

1/ The Fifth Circuit has taken a different view in Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980) and Abramson that "Durrett is simply wrong in its holding that a foreclosure is a transfer within the meaning of §67d [of the prior bankruptcy act]. Id, at 549.

In re

Judith Lynne Madrid,

Debtor.

LAWYERS TITLE INSURANCE CORP. AND DONALD TURNEY,

Appellants,

v.

JUDITH LYNN MADRID,

Appellee.

_____/

BAP No.NV-81-1106 -HVE.

Bankruptcy No.81-00038

United States Bankruptcy Appellate Panels of the Ninth Circuit

Argued Nov. 18, 1981
Decided June 22, 1982

In an action by a Chapter 11 debtor to set aside a transfer of a resident by nonjudicial foreclosure sale, the Bankruptcy Court, 10 B.R. 795, Bert M. Goldwater, J., rendered judgment in favor of debtor, and an appeal was taken. The Bankryptcy Appellate Panel, Hudges, J., held that nonjudicial foreclosure of deed

of trust would not be set aside as a fraudulent conveyance, even though purchase price was significantly less than fair market value in absence of some defect.

Reversed.

Volinn, J., dissented and file an opinion.

1. Mortgages 369(3)

Mere inadequacy of price will not upset a foreclosure sale.

2. Bankruptcy 181

Consideration received at a non-collusive, regularly conducted public sale satisfied "reasonably equivalent value" requirement of bankruptcy statute governing nonjudicial foreclosure sales even though purchase price was significantly less than fair market value. Bankr. Code, 11 U.S.C.A. §548, 548(a)(2).

3. Bankruptcy 178(1)

Nonjudicial foreclosure of deed of trust would not be set aside as a fraudulent conveyance, even though purchase price was significantly less than fair market value, in absence of some defect. Bankr. Code, 11 U.S.C.A §548.

Timothy J. Henderson, Henderson, Nelson & Moschetti, Reno, Nevada, for appellants.

Alan R. Smith, Miller & Daar, Reno, Nevada, for appellee.

Before Hughes, Volinn and Elliott, Bankruptcy Judges.

OPINION

Huges, Bankruptcy Judge:

The question presented by this appeal is whether a non-judicial foreclosure of a deed of trust can be set aside as a fraudulent conveyance under 11 U.S.C. §548 if the purchase price is

significantly less than fair market value. We hold that the consideration received at a non-collusive, regularly conducted public sale satisfies the "reasonably equivalent value" requirement of 11 U.S.C. §548(a)(2) and reverse the trial court's judgment avoiding the sale, 10 B.R. 795.

I.

Judith Madrid acquired a home near Lake Tahoe in September 1979 for $290,000, giving the seller $125,000 cash and a one-year note secured by a deed of trust for $165,000.00. The cash was raised with a note to Del Mar Commerce Co. for $142,500.00, secured by a second deed of trust. The second deed of trust was paid down by $75,300.00 in June, 1980 but no further payments were made and Del Mar requested the trustee under its deed of trust to commence non-judicial foreclosure

proceedings.

The trustee's sale took place on January 9, 1981, at which time $175,000.00 was due on the first deed of trust and $80,224.00 on the second. Donald Turney purchased at the sale for the amount of the second deed of trust. He took subject to the first deed of trust, which was in the process of foreclosure.

Madrid filed a Chapter 11 bankruptcy case on January 16, 1981 and, as debtor-in-possession, brought an action against Del Mar, Turney and the trustee under the deed of trust to set aside the trustee's sale of January 9. Two theories were advanced: 1. The sale did not comply with Nevada law; 2. The sale constituted a fraudulent conveyance pursuant to 11 U.S.C. §548(a)(2)(A). The trial court, holding that the foreclosure sale "was proper and in accordance with Nevada

statutes," found for defendants on the first theory. However, it entered judgment rescinding the foreclosure sale and cancelling the trustee's deed to Turney on the fraudulent conveyance theory.

Relying on a recent Fifth Circuit decision, the court found that Turney's bid was 64% to 67% of the property's market value at the time of sale and concluded that it was not reasonably equivalent value. The sale was held to be a voidable fraudulent conveyance. Thereafter, the court gave Turney a lien for the amount of his payment and for his attorneys fees in defending the fraudulent conveyance action. The title insurance company that had insured Turney's title was also given a lien for attorneys fees in defending the fraudulent conveyance

action.

Turney and the title company appealed the fraudulent conveyance judgment; Madrid appealed the award of a lien for attorneys fees. We reverse the judgment setting aside the sale; the judgment awarding a lien for fees is thereby rendered moot.

II.

The parties and this panel are aware of only two cases holding that a purchase at a nonjudicial sale under a deed of trust may be set side as being a fraudulent conveyance. Both cases were decided by the Fifth Circuit Court of Appeals under provisions of the Bankruptcy Act of 1898. They are Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980) and Abramson v. Lakewood Bank and Trust Co., 647 F.2d 547 (5th Cir. 1981).

In the earlier case, Durrett sought to avoid a foreclosure that took place nine days before he filed Chapter XI. The trial court held the nonjudicial sale was a transfer as that term was used in section 67d of the Act but that the consideration paid at the sale was a "fair equivalent" under section 67d(1)(e)(1) and denied relief. The circuit court reversed.

Section 67(d) of the former Act provided that every "transfer made and every obligation incurred by a debtor within a year" of bankruptcy is fraudulent as to existing creditors" if made or incurred without fair consideration by a debtor who is or will be rendered insolvent, without regard to actual intent..." Fair consideration was defined as a "fair equivalent" in a good faith exchange.

The controlling questions as seen by the Durrett court were (1) whether the trustee's sale constituted a transfer and (2) whether fair equivalent value was paid.

As to the transfer issue, the court acknowledged that the "actual transfer of title was made by Durrett to Fields, as trustee, via the deed of trust, executed April 7, 1969, to secure an indebtedness..." P.204. The transfer was more than one year before bankruptcy and therefore not vulnerable to attack under section 67d. The court held there was a second an final transfer on the day of the foreclosure sale, and this was within the one-year period.

As to the fair equivalent value issue, the Durrett Court noted that the trial court found the fair market value of the property on the date of the

foreclosure sale to be $200,000.00 and that the successful bid was $115,400.00 or 57.7 per cent of the fair market value. In reversing the trial court's determination that the amount paid was a fair equivalent, the court of appeals held as a matter of law that the amount paid was not a fair equivalent, suggesting that any amount less than 70% of fair market value would not be equivalent value.

The fair equivalent value issue was not reached in Abramson, which reserved a summary judgment on the transfer issue.

III

The case before us is governed by 11 U.S.C. §548 of the Bankruptcy Code. In its essential respects, it tracks section 67d of the former Bankruptcy Act. Thus, the questions presented for decision are (1) whether the foreclosure sale

constituted a transfer and (2) whether "reasonably equivalent value" was paid. 11 U.S.C. §548(a)(2). We find that "reasonably equivalent value" was paid and need not address the question of whether the sale constituted a transfer.

As stated earlier, the type of value that satisfied the Bankruptcy Act fraudulent conveyance provision was "fair equivalent value". In holding that a foreclosure sale for 57.7 percent of fair market value was not fair equivalent value, the Durrett court stated at page 203:

We have been unable to locate a decision of any district or appellate court dealing only with a transfer of real property as the subject of attack under section 67(d) of the Act, which has approved the transfer for less than 70 percent of the market value of the

property.

The only case cited in Durrett in support of that statement, Schafer v. Hammond, 456 F.2d 15 (10th Cir. 1972), was a voluntary transfer of real property by the debtor corporation to the mother of the principal stockholder of the debtor corporation. In view of our inability to find any cases other than Durrett and Abramson where a nonjudicial foreclosure sale was set aside on fraudulent conveyance grounds, we assume that the cases upon which Durrett fashioned the 70% fair market value rule were all voluntary, private transfers such as in Schafer.

However, valued it may be to hold that less than 70 percent of fair market value is not a fair equivalent for a private transfer to an insider, application of that standard to regularly

conducted public sales is questionable.

We decline to follow Durrett's 70 & fair market value rule for the reason that a regularly conducted sale, open to all bidders and all creditors, is itself a safeguard against the evils of private transfers to relatives and favorites.

The question remains whether the price obtained at a nonjudicial foreclosure sale is itself "reasonably equivalent value" of the property transferred.

IV

[1] If we consider the question of price adequacy in the context of foreclosure law we find, not surprisingly, that mere inadequacy will not upset a foreclosure sale, Golden v. Tomiyasu, 79 Nev. 503, 387 P.3d 989 (1963).

"[T]here must be in addition proof of some

element of fraud, unfairness, or oppression as accounts for and "rings about the inadequacy of price". Olter v. Sonoma County Land Title Company, 137 Cal. App.2d 633, 290 P.2d 880, which is identified as the Nevada rule. Golden v. Tomiyasu, supra 387 P.3d at 994-5. The trial court's construction of §548 would radically alter these rules. Any foreclosure sale which failed to bring 70% of the property's market value could be set aside by a bankruptcy trustee or a debtor-in-possession for a period of one year.

[2,3] The law of foreclosure should be harmonized with the law of fraudulent conveyances. Compatible results can be obtained in construing the reasonably equivalent value requirement of Code §548(a)(2) to mean the same as the consideration received at a non-collusive

and regularly conducted foreclosure sale. Thus, in the absence of defects, such foreclosure withstands avoidance as a fraudulent conveyance.

Reversed.

Volinn, Bankruptcy Judge, dissenting.

As stated by the majority, the issue is whether or not a transfer of the debtor's property, in the course of a deed of trust foreclosure sale, is the kind of transfer contemplated by 11 U.S.C. §548, the fraudulent conveyance section of the Bankruptcy Code. The majority holds that such a transfer may be a fraudulent transfer and that the reasonably equivalent value test is satisfied if the property is soled at a regularly conducted public sale and there is not collusion or irregularity.

Two decisions of the Fifth Circuit

Court of Appeals which involved similar facts and which held that the provisions of §67 of the Bankruptcy Act, the predecessor of §548, encompasses foreclosure sales, have aroused concerned comment. Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980); Abramson v. Lakewood Bank & Trust Co., 647 F.2d 547 (5th Cir. 1981). These cases are viewed as a new departure with a great potential for destabilizing long-established practice in the field of mortgage and deed of trust foreclosure.[1] See Abramson v. Lakewood Bank & Trust Co, at 549-50 (Clark, J., dissenting); In Re Alsop, 14 B.R. 982, (Bktcy. Alaska, 1981). Conceptually, the logic of Durrett is sound. While there may be some initial confusion as to whether the original transfer, by way of security, or the subsequent transfer at a forced sale is

the transfer which should be considered under §548, it is clear that it is the second transfer which actually divested the debtor of all interest in the property. To the extent that there may be a question as to whether or not the transfer was forced or voluntary, the Code definition of "transfer" includes involuntary transfer. 11 U.S.C. §101(40). The scope of this definition is at least as broad as its Act predecessor, 11 U.S.C. §1(30) which was in effect when Durrett was decided. See, H.R. Rep. No. 595, 95th Cong., 1st Sess. (1977), p. 314, U.S.Code Cong. & Admin. News 1978, p. 5787. Thus, §548, which states that a "trustee may avoid any transfer of an interest of the debtor" affects foreclosure sales which, albeit consented to, are in a real sense forced or involuntary.

The majority evidences great

concern with an arbitrary figure as to what may be reasonably equivalent value. It states that Durrett has in effect imposed an upset price of 70% in deed of trust or mortgage foreclosure sales. Durrett need not be read as categorically setting such a figure. The case held that a sale for 57% of the value was not for a reasonable equivalent value. In any event, I believe that the concept of "reasonably equivalent value" as a test set for 11 U.D.C. §548(a)(2) requires that the trial court examine the consideration received in such a sale in the factual context of a particular case.[2]

One cannot disregard the fact that a foreclosure sale is a forced sale and that the debtor contracted that such sale could occur in the event of default. Thus, there is a reasonable prospect that a sale under the circumstances of

foreclosure could result in a price which would be less than one made under ideal circumstances involving a seller who does not have to sell and a buyer who does not have to by. The reasonable value test of §548, as stated, is to be applied in particular factual contexts. It is thus possible, considering all the circumstances involved, that the consideration received from a forced sale pursuant to statute may be afforded a presumption that it is of reasonably equivalent value.

The majority, however, endows the consideration received at a non-collusive regularly conducted non-judicial foreclosure sale, with a conclusive or irrebuttable presumption of reasonableness. Functionally, the only way to question a fraudulent transfer under §548 is to examine the adequacy of

the consideration. If one is precluded from testing the transaction on the basis of the fraudulent transfer criterion and is deflected to criteria relating to questioning the validity of a deed of trust foreclosure, that is, collusion or irregular conduct, then the majority's logic in applying §548 as a factor in its decision is illusory.

The Bankruptcy Code is a Federal Statute. Section 548 states a standard with respect to reviewing consideration in the event of a transfer of the debtor's property. Section 548 transcends the dispute between this debtor and the secured creditor. It brings into focus the claims of the debtor's other creditors that they have been deprived of recourse to an asset by an improvident sale. The majority would hold that despite widespread differences in law and

practices relating to foreclosure, no bankruptcy court may entertain the factual issue of whether, under §548, the consideration paid was the reasonably equivalent value. By concluding that a regularly conducted sale in the absence of collusion satisfies the "reasonably equivalent value" test, the majority has excised vital language from §548 in order to create an exception to the statute where a forced sale of the debtor's property is involved. There is nothing in the Code nor its legislative history to suggest that such an exception was intended.

In conclusion, I would hold that the price paid at a regularly conducted foreclosure sale should be given, at best, a strong presumption of adequacy. It should be remembered that the burden of

proof in any event, is on the plaintiff to show that the consideration paid was inadequate. In this case the record shows that the Bankruptcy Judge heard the facts and gave the matter a good deal of thought.[3] He concluded that a price of about 67% of the fair market value was not a reasonably equivalent value. This is a finding of fact which may be overturned only if it is clearly erroneous. Bankr. Rule 810. I am satisfied that his conclusion was reasonable and supported by the record. I would affirm.

FOOTNOTES

[1]This is a policy issue, essentially. It may be that the problem should be dealt with legislatively. Insofar as it should be a matter of judicial concern, it is obvious that those who purchase at foreclosure sales do so to make a profit. From a certain point of view, the issue, insofar as it involves adequacy of price, gives consideration as to whether creditors of the debtor have suffered a loss by virtue of the purchaser getting too great a bargain. If this is found to be so, the purchases loses what the court found to be an excessive profit. He is still entitled at least to a lien for what he invested. 11 U.S.C. §548(c).

[2]The primary goal of the seller at a foreclosure sale is satisfaction of a debt. This goal is different than that of a seller trying for the highest possible price. Given this difference in motivation, and the same market circumstances, results could differ substantially. It is this difference which is the area of inquiry encompassed by the term "reasonably equivalent value".

[3]In his Opinion and Decision the trial court, after some analysis concluded:

> "Defendant Turney paid 64% to 67% of the market value of a very unique piece of residential property. At the time of the sale he was prepared to bid approximately $6,000.00

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more. Immediately after the sale he insured the property for $325,000.00 as fire value...a purchase price of $256,000.00 in this case is not the reasonably equivalent value of a market appraisal of $380,000.00 to $400,000.00."

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In re

JUDITH LYNNE MADRID,

Debtor.

Bankruptcy No.81-00038
Adversary No. 81-0003

_____/

JUDITH LYNN MADRID,

Plaintiff,

vs.

DEL MAR COMMERCE COMPANY, a California corporation; LAWYERS TITLE INSURANCE CORPORATION, a Virginia corporation, DONALD TURNEY, an individual; and DOES I through V, inclusive,

Defendants.

_____/

United States Bankruptcy Court
D. Nevada

May 1, 1981

In an action by a Chapter 11 debtor to set aside a transfer of a residence by nonjudicial foreclosure sale, the Bankruptcy Court, Bert M. Goldwater, J., held that price of $256,000.00, paid by

person whose business was to buy at foreclosures and resell, was not reasonably equivalent value of market appraisal of $380,000.00 to $400,000.00, and, accordingly, nonjudicial foreclosure sale would be rescinded by the bankruptcy court.

Sale rescinded.

1. Mortgages 352

That debtor appeared at office of trustee on deed of trust to request that certain order be sent to her at post office box number 6647 was not sufficient to put trustee on notice that debtor was using post office box number 6647 rather than box number 5926. N.R.S. 21.130, 107.080.

2. Mortgages 352

As between debtor and trustee on deed of trust, it was debtor's responsibility to request that post office

transfer her mail, and trustee was under no duty to search for debtor when notices were returned unclaimed, but where it was established that debtor actually knew about foreclosure sale, issue became moot. N.R.S. 21.130, 107,080.

3. Bankruptcy 165(3.2)

Nonjudicial foreclosure sale is involuntary transfer, but falls within bankruptcy code definition of "transfer". Bankr. Code, 11 U.S.C.A. §101(40).

See publication Words and Phrases for other judicial constructions and definitions.

4. Mortgages 369(3)

Price of $256,600.00, paid by person whose business was to buy at foreclosures and resell, was not reasonably equivalent value of market appraisal of $380,000.00 to $400,000.00, and, accordingly, nonjudicial foreclosure

sale was rescinded by the bankruptcy court. Bankr. Code, 11 U.S.C.A. §548(a)(2), (a)(2)(A), (a)(2)(B)(i), 1101, et seq.; Bankr. Act, §67(d)(2), 11 U.S.C.A. §107(d)(2).

Alan R. Smith, Miller & Daar, Reno, Nevada, for Plaintiff.

Timothy J. Henderson, Henderson, Nelson & Moschetti, Reno, Nevada, for Del Mar Commerce Co. & Lawyers Title Insurance Corp.

Roger A. Bergmann, Reno, Nev., for Donald Turney.

JUDGMENT AND NOTICE OF HEARING ON LIENS

Bert M. Goldwater, Bankruptcy Judge.

The Court having rendered its Opinion and Decision which states findings

of fact and conclusions of law, and good cause appearing, Judgment is hereby entered that:

1. The foreclosure sale of plaintiff's residence at 1528 Debra Lane, Incline Village, by defendant Lawyers Title to defendant Don Turney is hereby rescinded and the trustee's deed recorded as Document No. 717630 on January 13, 1981 with County Recorded of Washoe County, Nevada, is cancelled.

2. A hearing to establish the lien rights of the holder of the second deed of trust and defendants for principal, interest, costs, taxes, insurance premiums, and attorney fees is hereby set for Wednesday, May 6, 1981, at 10:00 a.m.

OPINION AND DECISION

This is an action by a Chapter 11 debtor to set aside a transfer of her

residence by a nonjudicial foreclosure sale upon the grounds that (1) she did not receive notices of default and sale pursuant to N.R.S. 107.-080 and 21.130, and (2) the sale is a voidable transfer under 11 U.S.C. §548(a)(2)(A) and (B)(i).

In late summer 1979, debtor, Judith Lynne Madrid (Judith), and her husband, Al Madrid (Al), decided to purchase a family residence as part of a property settlement agreement in which Al was to quitclaim his interest in the residence to Judith but continue to make the payments on the residence.[1] In September 1979, Judith and Al purchased a home at 1528 Debra Lane, Incline Village, Nevada, from George G. Sayre/Pulver Co. (Sayre/Pulver) for $290,000.00. Sayre/Pulver asked $125,000.00 down and was willing to accept a one-year note secured by a first deed of trust for the

balance of $165,000.00. The Madrids arranged through Del Mar Commence Company of Oakland, California (Del Mar), to borrow $142,500.00 for the cash down payment from one Laurel Blum to be secured by a second deed of trust.[2] Del Mar was trustee of record in the second deed of trust until August 12, 1980, when Lawyers Title Insurance Corporation of Reno, Nevada (Lawyers), was substituted as trustee.[3] The address given in the deed of trust for the trustor was 1528 Debra Lane.[4]

On September 4, 1979, Al quitclaimed his interest in the home to Judith. Escrow closed October 1979.

In January 1980, Judith rented Post Office Box No. 5926 at the Incline Village Post Office for one year and received the key. Soon thereafter, Al took the key away from her. In March, 1980, Judith

rented Post Office Box No. 6647, but did not advise the Incline Village Post Office to transfer her mail from Box No. 5926 to Box No. 6647. In October 1980, debtor became concerned she was not receiving her mail at Box 6647 and obtained another key to Box No. 5926. She kept the new key to Box No. 5926 until Mid-November when she learned that a criminal investigation against her husband was pending, and, out of fright, threw away the key.[5]

Debtor contends that she gave Del Mar her 6647 Post Office Box Number during a telephone call on November 19, 1980. Although Del Mar's witness testified that Del Mar has no record of such a telephone call, the Court finds that Del Mar was of November 19, 1980 that debtor wished to receive her mail at Post Office Box No. 6647.

There were frequent defaults on

the payments due under the first deed of trust, but the first few defaults were cured.[6] Default on the payment due under second deed of trust was made within a few months after the close of escrow. On June 19, 1980, debtor made a $75,300.00 principal payment on the second deed of trust, and signed a Modification and Extension Agreement which provided for a three-month extension for payment of principal to January 31, 1981, and an increased monthly interest payment.[7] After that payment, there was a principal balance of $67,200.00 with interest of $1,416.45 due on July 1, and interest of $840.00 per month due on the first day of each month thereafter. When debtor failed to pay the installments of interest due July 1, August 1, and September 1, the holder of the second deed requested Lawyers begin foreclosure proceedings.

Notice of default and election to sell the property under the second deed of trust was recorded September 10, 1980. A copy of the notice was mailed on that date, certified mail, to debtor at 1528 Debra Lane. That notice was returned unclaimed with the number "5926" written on the envelope. On October 6, 1980, another copy was sent certified mail to debtor at Post Office Box No. 5926. Notices for receipt of certified mail were placed in Box No. 5926 by the Post Office at Incline Village on October 7 and 16. The mail was not claimed and was returned to sender October 28, 1980.

On December 16, 1980, the notice of time and place of the sale scheduled for January 9, 1981 was mailed to debtor, certified mail, Debra Lane and at Post Office Box No. 5926. Both envelopes were returned unclaimed.

The sale was held on January 9, 1981. At the time of the sale there was approximately $175,000.00 due on the first deed of trust and $80,224.39 due on th second deed of trust. Defendant Turney, the only bidder at the sale, bid the amount due on the second deed of trust plus one dollar. He testified that he went to the sale prepared to bid as high as $86,500.00.[8] With expenses on the day of the sale, Turney planned to pay approximately $256,000.00 for the property. He immediately insured the improvements for fire in the amount of $325,000.00.

In the spring of 1980, debtor listed her property with a real estate broker for sale at $395,000.00. Extensive exposure was given by the realtor due to the uniqueness of the property. The "nearly" new 2700 square

foot residence is situated on a private road on a half-acre lot a short distance from a 250 foot private Lake Tahoe beach and pier shared by the Debra Lane homeowners.[9] The house was shown approximately twelve times, but no offers were received. Debtor terminated the realtor's listing in August 1980, but continued to try to sell the house or obtain financing until after the sale on January 9, 1980. The evidence showed that debtor was negotiating at the time of the sale with a potential buyer who had not knowledge of the sale. The buyer made a $342,000.00 for the property on January 10, 1981.

[1] In connection with her own efforts to sell or finance, debtor requested a title report on another piece of real property from Lawyers in early November. The debtor appeared at Lawyers

Reno office to request the order and the order was sent to her at Post Office Box No. 6647. That incident was not sufficient to put Lawyers on notice that debtor was using Post Office Box 6647 rather than Box No. 5926.

Also in connection with her efforts, debtor telephoned Jay Graves (of Del Mar) on December 24, 1980 to learn the amount due on the second deed of trust and whether or not the holder of the second would allow assumption of the debt.[10] The secretary who talked to debtor wrote a message on December 24, as follows:

> Judith Madrid called. She wants extension (sic) of 1-9-81 sale because she thinks she has buyer. She is at Nevada house. Debtor filed under Chapter 11 on January 16, 1981.

Her schedules show her insolvent financial condition. She owes in excess of

$25,000.00 mostly for improvements on the residence,[11] and is insolvent but for the potential equity in her residence. The equity, had the house been sold for its appraised value on January 9, 1981, would have been between $125,000.00 and $145,000.00. Defendant Turney's appraiser put the fair market value of the house at $330,000.00[12] Established Incline real estate brokers and plaintiff's appraiser placed the market value between $380,000.00 and $400,000.00, which the Court finds to be the fair market value on January 9, 1981.

Debtor contends she had no notices of the default or sale. Alternatively, debtor contends that even if she had constructive notice she did not have property notice because she should have been noticed at her last known address, Post Office Box No. 6647.

Debtor also contends that the transfer of her residence to defendant Turney for approximately $256,000.00 was a fraudulent transfer under 11 U.S.C. §548(a)(2)(A) and (B)(i) because the sale price was less than a reasonably equivalent value.

I.

N.R.S. 107.080 provides in part:

3. That 15 or 35 day period provided in paragraph (a) of subsection 2 commences on the first day following the day upon which the notice of default and election to sell is recorded in the office of the county recorder of the county in which the property is located and a copy of the notice of default and election to sell is mailed by certified mail with postage prepaid to the grantor or to his successor in interest at the address of the grantor or his successor in interest

if known, otherwise to the address of the trust property. Such notice of default and election to sell must describe the deficiency in performance of payment and may contain a notice of intent to declare the entire unpaid balance due and payable if acceleration is permitted by the obligation secured by the deed of trust, but acceleration must not occur if the deficinecy in performance or payment is made good and any costs, fees and expenses incident to the preparation or recordation of such notice and incident to the making of the deficiency in performance or payment are paid within the time specified in subsection 2.

4. The Trustee, or other person authorized to make the sale under the terms of the trust deed or transfer in trust, shall, after expiration of the 3-month period following the recording of

notice of breach and election to sell, and prior to the making of such sale, give notice to the time and place thereof in the manner and for a time not less than that required by law for the sale or sales of real property upon execution. The sale itself may be made at the office of the trustee, if the notice so provided, whether the property so conveyed in trust is located within the same county as the office of the trustee or not.

N.R.S. 21.130 provides in part:

3. Real Property. In care of real property, by personal service upon each judgment debtor or by registered mail to the last known address of each judgment debtor and by posting a similar notice particularly describing the property, for 20 days successively, in 3 public places of the township or city where the property is situated and also where the property is

to be sold; and also by publishing a copy of the notice three times, once a week, for 3 successive weeks, in a newspaper, if there be one in the county. The cost of publication shall in no case exceed the rate for legal advertising as provided in NRS 238.070. In any case where the paper authorized by this section to publish such notice of sale neglects or refuses from any cause to make such publication, then the posting of notices as provided in this section shall be deemed sufficient notice. Notices of the sale of property on execution upon a judgment for any sum less than $500.00, exclusive of costs, shall be given only by posting in 3 public places in the county, 1 of which shall be posted at the courthouse. (Emphasis added).

As to N.R.S. 108.080 and 21.130, the issue is whether or not the statutory notices were adequate in light of the fact

that they were mailed to Post Office Box No. 5926 and returned to sender unclaimed.

[2] Debtor had complete access to Post Office Box No. 5926 when notice of the receipt of certified mail containing the notice of default and election to sell was placed in Box No. 5926 on October 16, 1980. Additionally, it was the debtor's responsibility to request that the Post Office transfer her mail from 5926 to 6647.

Lawyers was under no duty to search for debtor when the notices were returned unclaimed. Turner v. Dewco Services, Inc., 87 Nev. 14, 479 P.2d 462 (1971). Debtor's action in throwing away the key to the box is no defense.

Although Del Mar knew debtor's last known address and failed to advise Lawyers, the issue becomes moot because it appears debtor had notice. Debtor's call

to Del Mar on December 24, 1980 establishes the fact the debtor actually knew about the foreclosure sale. Hankins v. Adm. of Veterans Affairs, 92 Nev. 578, 555 P.2d 483 (1976).

Foreclosure was proper and in accordance with Nevada statutes.

II.

11 U.S.C. §548(a)(2)(A) and (B)(i) provide:

> (a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor-
>
> * * * * *
>
> (2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and
>
> (B)(i) was insolvent on the date that such transfer was made or such obligation was incurred; or became insolvent as a result of such transfer or obligation;

With respect to Section 548(2)(A), the issue is whether or not the price paid was a reasonably equivalent value.

Section 548(a)(2) is derived in part from §67(d)(2) of the former Bankruptcy Act which permitted a trustee in bankruptcy to avoid transfers by the debtor in fraud of his creditors. Bankr. Act, Section 67(d)(2), H.R. Rep. No. 95 595, 95th Cong., 1st Sess. 375 (1977), U.S. Code Cong. & Admin. News 1978, p.5787. Under §67(d)(2) fair consideration had to be given for a transfer and fair consideration included the requirement of good faith as well as fair equivalent value. Cohen v. Sutherland, 257 F.2d 737 (2d Cir. 1958). Under present Section 548(a)(2)(A) and (B)(i), if the two conditions of less than reasonably equivalent value and insolvency are present, there is a

conclusive presumption of fraud, any intent to the contrary notwithstanding. 4 Collier on Bankruptcy 543-48 (15th ed. 1980).[13] Fair consideration under former Section 67(d)(2), but for its good faith requirement, corresponds to reasonably equivalent value under Section 548(a)(2)(A).[14]

[3] Cases under Section 67(d)(2) hold that fair consideration must be determined by the facts and circumstances of each case. In In re Ferris, 415 F. Supp. 33, 40 (W.D. Okl. 1976), the Court held that the consideration was not fair in view of the facts that the mortgage had been reduced, the bankrupts had spent considerable sums which enhanced the value of the property, and the cost of replacement was estimated to be much more than the original building costs.

A case upon almost identical

facts with the case at bar is Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980). In Durrett there was only one bidder at the deed of trust foreclosure sale and he bid $115,400.00 (the exact amount necessary to liquidate the indebtedness secured by the deed of trust) for property valued at $200,000.00. The District Court for the Northern District of Texas (460 F.Supp. 52) held that the payment of 57.7% of the value of the property was fair consideration. The Fifth Circuit reversed stating:

> We have been unable to locate a decision of any district or appellate court dealing only with a transfer of real property as the subject of attack under Section 67(d) of the Act, which has approved the transfer for less than 70 percent of the market value of the property.

In making its decision in Durrett, the

Court relied heavily on the fact that the sale deprived the bankruptcy estate of an equity in the property of $84.600.00.

[4] The facts in this case differ only in that the defendant Turney paid 64% to 67% of the market value of the property rather than 57.7%. The equity which the bankruptcy estate and creditors have been deprived of in this case ranges from $125,000.00 to $145,000.00. It is apparent that the Courts have established a firm 70% guideline because the greater the market value of a piece of property the more equity that can be cut off by the variation of a few percentage points.

Defendant Turney paid 64% to 67% of the market value of a very unique piece of residential property. At the time of the sale he was prepared to bid approximately $6,000.00 more. Immediately after the sale he insured the property for

$325,000.00 as fire value. The debtor enhanced the value of the property with certain improvements and paid $75,300.00 in principal on the second deed of trust. A buyer on January 10, 1981, was willing to pay approximately $85,000.00 more than was paid at the foreclosure sale.

A purchase price of $256,000.00 in this case is not the reasonably equivalent value of the market appraisal of $380,000.00 to $400,000.00.

FOOTNOTES

[1] The testimony shows that the parties had been separated since 1977, and were buying a house in order to settle certain of their affairs before filing for divorce.

[2] The disposition of the balance of $17,500.00 remaining after the cash down payment of $125,000.00 is unknown.

[3] Debtor was not given notice of the substitution of trustees, but the lack of notice is not relevant as will later appear.

[4] Although 1528 Debra Lane was given as the trustor's address, there is no street delivery in Incline Village.

[5] One part of the criminal investigation appears to have resulted from Al's writing numerous bad checks.

[6] Notices of default were served May 1, 1980, August 28, 1980, and October 23, 1980. At the time of the sale under the second deed of trust, Sayre/Pulver was also proceeding with foreclosure.

[7] Al was to make all of the payments on the promissory notes secured by the first and second deeds of trust, but failed to make any such payments.

[8] Turney's business is to buy at foreclosures and resell. Turney was a bona fide purchaser.

[9] Defendant Turney's expert witness testified that she did not cost approach analysis because land with access to a

private beach can no longer be bound at Lake Tahoe.

[10] Mr. Graves is a lawyer who represented the holder of the second deed of trust.

[11] After she moved into the house debtor had the yard landscaped, added shutter, a fence, and a ballet bar which improvements definitely increased the value of the property.

[12] The appraisal does not consider a cost approach analysis.

[13] Although a nonjudicial foreclosure sale is an involuntary transfer, it clearly falls within the definition of transfer in 11 U.S.C. §101(40). See also Cowen v. Guidry, 274 F.Supp. 22 (E.D. La. 1967).

[14] No cases have been found which define reasonably equivalent value under 11 U.S.C. §548(a)(2)(A).

Office-Supreme Court, U.S.
FILED
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CLERK

No. 83-2107

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JUDITH LYNNE MADRID,

PETITIONER,

V.

LAWYERS TITLE INSURANCE CORP.,
AND DONALD TURNEY,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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ADDITIONAL QUESTIONS PRESENTED FOR REVIEW

1. Is the non-judicial foreclosure of a Deed of Trust a transfer within the meaning of 11 U.S.C.§101(41) and 11 U.S.C. §548(d)(1)?

2. Is the non-judicial foreclosure of a Deed of Trust a transfer made by the debtor and is the value paid at such sale in exchange for such transfer received by the debtor under the provisions of 11 U.S.C.§548(a)(1) and §548(a)(2)(A)?

3. Is the price paid at a non-collusive, public, non-judicial Trust Deed foreclosure sale itself the "reasonably equivalent value" of the property transferred under the provisions of 11 U.S.C. §548(a)(2)(A)?

4. If the non-judicial foreclosure of a Deed of Trust is a transfer within the meaning of 11 U.S.C. §101(41) and 11 U.S.C. §548(d)(1) and the price paid at such sale does not itself define "reasonably equivalent value", then what standards should be used to determine "reasonably equivalent value".

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No. 83-2107

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JUDITH LYNNE MADRID,

PETITIONER,

V.

LAWYERS TITLE INSURANCE CORP., AND DONALD TURNEY,

RESPONDENT.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Respondent, Lawyers Title Insurance Corporation, submits this Response to Petition for Writ of Certiorari on behalf of itself and Donald

Turney for the purpose of joining in the request of Petitioner, Judith Lynn Madrid, for review of the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 13, 1984, and for the further purpose of presenting additional questions for review.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals, reported at 725 F.2d 1197 (9th Cir. 1984), the Opinion of the Bankruptcy Appellate Panel from which appeal was taken to the Ninth Circuit Court of Appeals, reported at 21 B.R. 424 (B.A.P. 9th Cir. 1982), and the Bankruptcy Court Opinion from which appeal was taken to the Bankruptcy Appellate Panels of the

Ninth Circuit, reported at 10 B.R. 796 (BK D. Nev. 1981), are set forth in full at pages A-1, A-34 and A-58, respectively, in the Appendices to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by Judith Lynn Madrid, Petitioner, which Appendices are incorporated by reference into Respondent's Response to Petition for Writ of Certiorari.

JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered February 13, 1984. Petitioner's initial Petition for Writ of Certiorari was served upon Respondent on May 11, 1984. That Petition for Writ of Certiorari was returned undocketed to Petitioner by the office of

the Clerk of the Supreme Court on May 14, 1984 for improper form. A revised Petition for Writ of Certiorari was docketed by the Clerk's office on June 25, 1984. The undersigned counsel for Respondent was informed by the Clerk's office that Lawyers Title Insurance Corporation's response was due on July 27, 1984.

On July 27, 1984, Respondent submitted its Answer and Cross-Petition for Writ of Certiorari. Respondent's Answer and Cross-Petition was not filed for the reason that pursuant to Supreme Court Rule 19.5, the Response was improperly joined with the Cross-Petition. Respondent now submits this Response to Petition for Certiorari for review. This

Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 11 U.S.C. §548, quoted in Appendix "A" hereto, requiring that the debtor make the transfer, §548 (a); establishing the "reasonably equivalent value" requirement, §548 (a)(2)(A); and specifying the criteria when a transfer shall be deemed to have been made, §548(d)(1). Also involved is the statutory provision contained in 11 U.S.C.§101(41) quoted in Appendix "B" hereto, defining "transfer" under the Act. This case arose under the Bankruptcy Reform Act of 1978, Public Law 95-598 (H.R. 8200); November 6, 1978.

STATEMENT OF THE CASE

Respondent does not disagree with the statement of the nature of the case set forth in Judith Lynn Madrid's Petition for Writ of Certiorari at pages 10 and 11 and therefore incorporates the same into this Response to Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Stability in the law of secured transactions is of extreme importance in the business, banking, and real estate arena not only on the local and state level but on a national basis as well. Deeds of trust, security agreements and other instruments utilized to collateralize a business transaction must be certain in their consequence subsequent to enforcement if the collateral is to do

what it is intended to do, that is, be used to satisfy the obligation or indebtedness thereby secured. That is not to say, however, that a foreclosure or collateral forfeiture proceeding should not be held in abeyance or stayed pending an attempt at reorganization. Postponement of foreclosure or collateral forfeiture has long been held constitutional so long as safeguards are provided to protect the rights of secured creditors throughout the reorganization proceeding to the extent of the value of their interest in the property. Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway, 294 U.S. 648, 55 S.Ct. 595, 79 L.ed. 1110 (1935). Wright v. Union

Central Life Insurance Co., 311 U.S. 273, 61 S.Ct. 196, 85 L.ed. 184(1940). However, the issue raised in this case does not concern the constitutionality or effect of staying a foreclosure or collateral forfeiture proceeding prior to its consummation, but rather whether or not the foreclosure or collateral forfeiture proceeding may be reviewed post-sale or forfeiture by a bankruptcy court to determine whether or not sufficient consideration ("reasonably equivalent value", 11 U.S.C. §548(a)(2)(A)) was paid at the foreclosure sale or collateral forfeiture proceeding.

Application of the fraudulent transfer provisions of the bankruptcy laws first arose in the case of Durrett v.

Washington National Ins. Co., 621 F.2d 201 (1980), Appendix "C" hereto. There the Fifth Circuit Court of Appeals cast doubt to the finality of trust deed foreclosure sales by holding that the foreclosure sale itself was a transfer within the purview of Section 67(d) of the former Bankruptcy Act [11 U.S.C. §107(d)]. Having determined that a transfer had occurred the Fifth Circuit Court of Appeals then reviewed the foreclosure sale to determine whether a "fair" consideration and a "fair equivalent" value had been paid by the secured party within the meaning of §67(d)(1),(e)(1) of the Act, 11 U.S.C. §107(d)(1),(e)(1). Although the secured party's bid at the non-judicial foreclosure sale was the exact amount

necessary to fully satisfy the indebtedness secured by the Deed of Trust, the Fifth Circuit Court of Appeals determined that the bid amount was but 57.7% of the fair market value of the property and as such the sales price was not a "fair equivalent" for the property. The sale was declared voidable under §67(d) and the debtor-in-possession, Durrett, was restored with title to the property.

Although decided under the provisions of the former Bankruptcy Act (the Bankruptcy Statute of 1898, as amended) the Durrett case, supra, quickly became authority upon which bankruptcy courts throughout the United States relied in interpreting the fraudulent transfer

provisions of the Bankruptcy Reform Act of 1978, (§67(d) of the former Bankruptcy Act being substantially the same as the provisions contained in §548 of the Bankruptcy Reform Act of 1978). A list of the Bankruptcy Court cases which have followed the reasoning of the Fifth Circuit Court of Appeals in the Durrett case, supra, under §548 of the Bankruptcy Reform Act of 1978 are set forth at pages 23 and 24 of Judith Lynn Madrid's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. The trial court decision in this case, cited at 10 B.R. 796 (BKD Nev. 1981) (Petitioner's Appendices page A-58) also adopted the reasoning of the Fifth Circuit Court of Appeals in its ruling in favor of

Judith Lynn Madrid. However, on appeal to the United States Bankruptcy Appellate Panel for the Ninth Circuit the lower court holding was reversed, the Bankruptcy Appellate Panel holding that the price obtained at a non-collusive and regularly conducted trust deed foreclosure sale is itself the "reasonably equivalent value" of the property transferred. On further appeal, the United States Court of Appeals for the Ninth Circuit affirmed the Bankruptcy Appellate Panel in its reversal of the lower court opinion on the grounds that the non-judicial foreclosure sale was not a transfer within the meaning of 11 U.S.C. §548 and 11 U.S.C. §101(41).

Thus, there exists an absolute conflict in the Federal Circuits on the

application of 11 U.S.C. §548 to foreclosures of perfected deed of trust security interests. On the one hand is the holding of the Fifth Circuit Court of Appeals, which has been followed in numerous other circuits, that a non-judicial trust deed foreclosure sale is a transfer within the meaning of 11 U.S.C. §548 and §101(41) and that the price paid at the non-judicial foreclosure sale should be scrutinized for "reasonably equivalent value". On the other hand, the Ninth Circuit has rejected the reasoning of the Fifth Circuit Court of Appeals in holding that the price paid at a non-collusive, regularly conducted non-judicial trust deed foreclosure sale is itself the reasonably equivalent value

and that further the foreclosure sale itself does not constitute a transfer within the meaning of 11 U.S.C. §548 and §101(41). No better example of the divergence of opinion in the application of the bankruptcy fraudulent transfer provisions can be found than in the Fifth Circuit itself in the case of Abramson v. Lakewood Bank & Trust, 642 F.2d 547 (1981), Appendix "D" hereto. There, the majority of the Court followed the reasoning previously set forth in the Durrett case, supra. However, Judge Clark in his dissent at 647 F.2d at page 549, disagreed with the reasoning of the majority and concluded that a foreclosure sale is not a transfer intended to be subject to the fraudulent transfer

provisions of the Bankruptcy Act. This reasoning was later adopted by the Ninth Circuit Court of Appeals.

Another excellent illustration of the dichotomy of opinion on the issues involved in this case can be found in two recent articles appearing in the "Business Lawyer Journal" each reaching the opposite conclusion. The first article is entitled "Real Property Foreclosure as a Fraudulent Conveyance: Proposals for Solving the Durrett Problem", 38 Bus. Law. 1605 (1983), wherein Messrs. Alden, Gross and Borowitz conclude that foreclosure sales should be treated as a transfer under §548 of the Bankruptcy Code subject to scrutiny at the time of the sale to determine whether or not that sale obtained the

reasonably equivalent value of the property foreclosed. The more recent article taking the opposite position is entitled "Fraudulent Transfers According to Alden, Gross and Borowitz: A Tale of Two Circuits", 39 Bus. Law. 977 (May, 1984), wherein Messrs. Zinman, Houle and Weiss conclude that the Durrett rule is incorrect and that the Ninth Circuit reached the correct conclusion in its Bankruptcy Appellate Opinion and Ninth Circuit Court of Appeals' Opinions in this case below.

Lawyers Title Insurance Corporation is not, in this Response to Petition for Writ of Certiorari, attempting to fully argue the merits of its case and the many reasons why the Ninth Circuit Court of

Appeals should be affirmed by this Court if the Petition for Writ of Certiorari is granted and this appeal proceeds for briefing and argument. Many of the arguments in support of the Fifth Circuit Court of Appeals as evidenced in the Durrett case, supra, and many of the counter-arguments in support of the Ninth Circuit Court of Appeals in its decision in this case below, supra can be reviewed by a reading of the case authorities cited in Petitioner's and Respondent's briefs and respective appendices, together with a review of the Business Lawyer Journals articles referred to above.

Recent amendments to the United States Bankruptcy Code may also have an effect upon whether or not Certiorari is

granted in this case. While the attorneys for Respondent have not yet received a final copy of the Bankruptcy Amendments and Federal Judgeship Act of 1984 as signed into law by President Reagan on Wednesday, July 11, 1984, Congress Report No. 98 sets forth the amendments which the undersigned attorneys for Respondent are informed and believe remained intact with the final enactment.

Section 421(i) states as follows:

> "Section 101(44) of Title 11 of the United States Code, as so redesignated, is amended by striking out the period and inserting in lieu thereof 'and foreclosure of the debtor's equity of redemption; and'."

11 U.S.C. §101(41), Appendix B hereto, was redesignated as §101(44) in the amendments. 11 U.S.C. §548(a) was

also amended in §463 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 as follows:

> "§463. (a) Section 548(a) of Title 11 of the United States Code is amended --(1) by striking out 'if the debtor' and inserting in lieu thereof 'if the debtor voluntarily or involuntarily';"

Under the provisions of §553(a) of the Bankruptcy Amendments and Federal Judgeship Act of 1984, the amendments to §101(41) and §548(a) become effective ninety days after the date of enactment of the Act.

By amending the definition of "transfer" to include "foreclosures of debtor's equity of redemption" Congress would appear to have legislatively adopted the Fifth Circuit Court of Appeals

reasoning in the Durrett case, supra. However, Respondent submits that because of the present volatility of the Bankruptcy Laws and the potential that the recent amendments may be further amended, that the transfer issue raised in this case be reviewed by this Court notwithstanding the Bankruptcy Amendments and Federal Judgeship Act of 1984. Further, there exists under the state law of the State of Nevada no equity or right of redemption in foreclosure sales under trustee's power of sale in a deed of trust. Nevada Revised Statute §107.080 entitled,

> "Trustee's Power of Sale: Notice of Default and Election to Sell; Deficiency in Performance, Payment; Place of Sale; No Equity, Right of Redemption; Shares of Cooperative Housing Corporation"

states at subsection 5 thereof:

> "Every sale made under the provisions of this section and other sections of this chapter vests in the purchaser of the title of the grantor without equity or right of redemption. The sale of a lease of a dwelling unit of a cooperative housing corporation vests in the purchaser title to the shares in the corporation which accompany the lease." (Emphasis added)

Thus, while Congress has added to the definition of transfer the foreclosure of a debtor's equity of redemption, under Nevada State law the debtor's equity of redemption does not exist. Therefore, as pertains at least to the State of Nevada the recent amendments to the Bankruptcy Act would have no application.

Furthermore, Respondent has presented three additional questions for review in

its Response to Petition for Writ of Certiorari concerning the provisions of 11 U.S.C §548(a)(2)(A), which require as an element of fraudulent transfer that "less than a reasonably equivalent value" be received. These questions certainly remain ripe for review and are particularly important in light of the recent amendments to the transfer definitions. Section 548(a)(2)(A) was not amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984 and therefore no legislative intent can be implied to modify the law existing under that subsection. In this case the Bankruptcy Appellate Panel held that the price paid at a non-collusive legitimately conducted foreclosure defines the

reasonably equivalent value. That question remains ripe for review and should be reviewed by this Court. Even if this Court disagrees with the Bankruptcy Appellate Panel conclusion, this Court should delineate the standards to be utilized by Bankruptcy Courts in making a determination of "reasonably equivalent value".

CONCLUSION

Judicial interpretation of 11 U.S.C. §548, Fraudulent Transfers, and its application to legitimate non-collusive foreclosure sales has resulted in a direct conflict between the circuits. Presently, a secured business transaction in the Ninth Circuit can be foreclosed without concern of challenge in a bankruptcy

proceeding from the obligor or the obligor's trustee. Conversely, in other circuits, specifically the Fifth Circuit, the foreclosure of the identical transaction could be challenged upon foreclosure as a transfer subject to scrutiny by a bankruptcy court for a reasonably equivalent value determination. This is a classic situation of Federal law being interpreted at two opposite ends of the spectrum in different circuits and one which is ripe for review by the Supreme Court. Lenders, title insurance companies, real estate brokers and others who deal in, insure or handle the making and foreclosure of secured transactions need a final answer to this most important issue. This Court is asked to bring

uniformity in the application of §548 of the Bankruptcy Reform Act of 1978 between the Circuits and in this appeal stabilize the law of secured transactions on a national level by rejecting the reasoning of the Fifth Circuit Court of Appeals in the Durrett and Abramson cases, supra, and affirming the holdings of the Bankruptcy Appellate Panel of the Ninth Circuit and the Ninth Circuit Court of Appeals in the Madrid case, supra.

The questions raised in this case have far reaching effects on all business transactions in which security collateral is held. It affects untold millions of dollars in business transactions each day. This Court is respectfully requested to grant the Writ of Certiorari and, at the

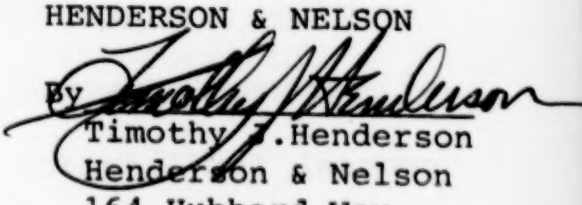
least, rule on the questions raised in this matter concerning the reasonably equivalent value issues so that title companies, banks, home sellers and others involved in the day-to-day activities of lending and security instruments will not continue to wallow in the confusion emanating from the Durrett decision, supra.

This Court as the final expositor of federal law has a duty to bring finality and uniformity to important questions of federal law, particularly where opposite conclusions have been reached in the Circuit Courts. This is especially true with significant issues of federal specialties, such as bankruptcy. Maggio v. Zeitz, 333 U.S. 56, 68 S.Ct. 401, 92

L.ed.476 (1948). Each of the above elements are present in this case. Certiorari should be granted and the issues raised in Petitioner's and Respondent's Briefs reviewed in full.

Respectfully submitted this 15th day of August, 1984.

HENDERSON & NELSON

By 
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CERTIFICATE OF SERVICE

The undersigned, counsel for Respondent, Lawyers Title Insurance Corporation, a member of the Bar of the Supreme Court of the United States, certifies that counsel for Petitioner has been served with three copies of the foregoing Response for Writ of Certiorari, by personal service of the document to counsel for Petition at his address, 832 Willow Street, Reno, Nevada,

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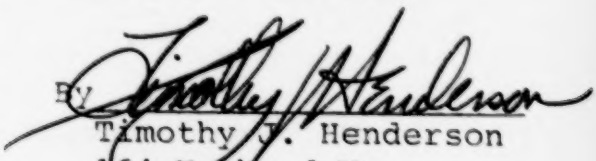
All parties required to be served have been served.

DATED this 15th day of August, 1984.

HENDERSON & NELSON

BY 

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APPENDIX A

BANKRUPTCY REFORM ACT OF 1978

11 U.S.C. §548

§548. Fraudulent transfers and obligations

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor--

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer occurred or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(i) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(ii) was engaged in business, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(iii) intended to incur, or believed that the debtor would incur, debts that would be beyond the

debtor's ability to pay as such debts matured.

(b) The trustee of a partnership debtor may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, to a general partner in the debtor, if the debtor was insolvent on the date such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.

(c) Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 of this title, a transferee or

obligee of such a transfer or obligation that takes for value and in good faith has a lien on any interest transferred, may retain any lien transferred, or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer becomes so far perfected that a bona fide purchaser from the debtor against whom such transfer could have been perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so

perfected before the commencement of the case, such transfer occurs immediately before the date of the filing of the petition.

(2) In this section--

(A) "value" means property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor; and

(B) a commodity broker or forward contract merchant that receives a margin payment, as defined in section 761(15) of this title, takes for value.

APPENDIX B

11 U.S.C. §101

§101. Definitions

In this title--

(41) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest.

APPENDIX C

J.W. DURRETT, SR., Plaintiff-Appellant,

v.

THE WASHINGTON NATIONAL INSURANCE CO., et al.

Defendants-Appellees.

No. 78-3351.

UNITED STATES COURT OF APPEALS,

FIFTH CIRCUIT.

July 11, 1980.

Debtor in possession under Chapter XI of Bankruptcy Act sought to set aside and vacate an alleged transfer of real property effectuated nine days prior to filing of petition for arrangement, charging that transfer was voidable. The United States District Court for the Northern District of Texas, William M. Taylor, Jr., J., 460 F. Supp. 52, denied

relief, and appeal was taken. The Court of Appeals, Orma R. Smith, District Judge, sitting by designation, held that: (1) payment of $115,000 for transfer of property under deed of trust pursuant to foreclosure sale was not "fair" consideration or a "fair equivalent" within meaning of section of Bankruptcy Act governing fraudulent transfers, and (2) transfer accomplished by trustee pursuant to power of sale provision of deed of trust was a "transfer made" by debtor in possession within contemplation of section of Bankruptcy Act governing fraudulent transfer.

Judgment vacated; remanded with directions.

1. Bankruptcy 181

Payment of $115,000 for transfer of property under deed of trust pursuant to foreclosure sale was not "fair" consideration or a "fair equivalent" within meaning of section of Bankruptcy Act governing fraudulent transfers. Bankruptcy Act, §67(d)(1),(e)(1), 11 U.S.C.A. §107(d)(1),(e)(1).

See publication Words and Phrases for other judicial constructions and definitions.

2. Bankruptcy 958

Transfer of title to real property of debtor in possession pursuant to arrangement under Chapter XI of Bankruptcy Act, by trustee on

foreclosure of deed of trust, to purchaser at sale constituted a "transfer made" by debtor in possession within purview of section of Bankruptcy Act governing fraudulent transfers. Bankr. Act, §67(d), 11 U.S.C.A. §107(d).

See publication Words and Phrases for other judicial constructions and definitions.

Philip I. Palmer,Jr., Dallas, Tex., for plaintiff-appellant.

Larry G. Alexander, Edith DeBusk, Dallas, Tex., for Jack Mitchell.

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN and POLITZ, Circuit Judges, and SMITH*, District Judge.

ORMA R. SMITH, District Judge:

This appeal concerns an action instituted in the United States District Court for the Northern District of Texas, wherein plaintiff Jack W. Durrett, Sr. (herein "Durrett"), acting as debtor in possession under Chapter XI of the Bankruptcy Act,[1] 11 U.S.C. §§701, et seq., seeks to set aside and vacate an alleged transfer of real property effectuated nine days prior to the filing of a Petition for

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* District Judge of the Northern District of Mississippi, sitting by designation.

1. The sale of the property under attack here, occurred January 4, 1977. Plaintiff filed a Petition for Arrangement

an Arrangement under Chapter XI. Durrett charges that the transfer is voidable

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Under Chapter XI of the Bankruptcy Act on January 13, 1977). Section 403(a) of Pub.L. No. 95-598, Title 1 (Nov. 6, 1978), 92 Stat. 2549; provides as follows:

> A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act [Pub.L. 95-598] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

Because the acts giving rise to this litigation occurred before the effective date of the new bankruptcy act, Pub. L. 95-598, the rights of the litigants are governed by "Repealed Title 11". When reference is made herein to the "Act" or the "Bankruptcy Act" the same shall refer to "Repealed Title 11".

under section 67(d) of the Act, 11 U.S.C. §107(d)[2]. The district court held that

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2. Section 67(d) of the Act provides in pertinent part:

> (1) For the purposes of, and exclusively applicable to, this subdivision: . . .(e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred . . . .
>
> (2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent;. . .
>
> (6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this title, which is fraudulent under this subdivision against creditors of such debtor having claims provable under

the non-judicial sale involved in the litigation constituted a transfer within the meaning of section 67(d). However, the court determined that the amount paid by the purchaser at the sale conducted by a trustee in the foreclosure of a deed of trust executed by Durrett, the indebtedness which it secured being then in default, was a "fair" consideration and

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> this title, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value:. . .
>
> And provided further, That such purchaser, lienor, or obligee, who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment. . . (Emphasis in original).

a "fair equivalent" within the meaning of section 67(d)(1), (e)(1) of the Act, 11 U.S.C. §107(d)(1), (e)(1). The court denied the relief sought by Durrett and he appeals. We reverse.

A review of the record on appeal reflects the following facts. On April 7, 1969, Durrett executed a note in the amount of $180,000.00 in favor of Southern Trust and Mortgage Company (hereafter "Southern"). The note was secured by a deed of trust upon the subject real property. Southern, on April 7, 1969, assigned the trust deed and note to defendant, The Washington National Insurance Company (hereafter "Washington"). Defendant J.H. Fields, Jr. (hereafter "Fields"), was named as the

trustee in the deed of trust. The deed of trust contained a provision for a public sale of the real property thereby conveyed, in case of default in payment of the indebtedness.

On December 13, 1976, Fields, in his capacity of trustee, posted the property for foreclosure sale. The sale was held on January 4, 1977. Defendant Shannon Mitchell, Sr. (hereafter "Mitchell"), appeared at the sale and bid the sum of $115,400.00 for the property. This was the only bid received by the trustee at the sale. The amount of the bid was the exact amount necessary to liquidate the indebtedness secured by the deed of trust. Upon receipt of the bid price, Fields executed and delivered to Mitchell a

trustee's deed to the property. The parties agree that Mitchell did not have any actual fraudulent intent when making the purchase. He responded to the notice of sale and became the successful bidder. Mitchell and Durrett are the only parties now interested in the case.

Durrett contends that the transfer of the property, pursuant to foreclosure of the deed of trust, is voidable under the provision of section 67(d).

The district court dismissed the complaint after a non-jury trial. In its findings of fact, the court held that the fair market value of the property on January 4, 1977, the date of the foreclosure sale, was the sum of $200,000.00

The parties do not take issue with this finding. Both agree that it is not clearly erroneous. See, Rule 52(a), Fed. R.Civ.P.; Kentucky Fried Chicken Corp. v. Diversified Packaging Corp., 549 F.2d 368, 377 (5th Cir. 1977).

Durrett asserts, on appeal, only one assignment of error, i.e., "Is $115,400.00 payment for an asset worth $200,000.00, a 'fair equivalent'".

In consideration of the issue of "fair equivalent", we should determine by what standard we are to judge the district court's conclusion of law that the amount paid for the property, $115,400.00, is "fair" consideration and a "fair

equivalent" within the meaning of section 67(d)(1),(e)(1).[3]

We have held that our review of conclusions of law by the district court in non-jury cases is not restricted by the "clearly erroneous" rule and will be reversed if incorrect. See Ealy v. Littlejohn, 569 F.2d 219, 229 n. 31 (5th Cir. 1978). See also, Buchanan v. United States Postal Service, 508 F.2d 259, 267 n. 24 (5th Cir. 1975).

The question with which we are confronted is whether the district court's conclusion of law on the "fair equivalent"

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3. The district court's conclusion of law refers to Mitchell's payment as being the sum of $115,000.00. The findings of fact, however, stated the payment to be $115,400.00. The record reflects the latter to be the correct bid price.

issue is incorrect, when considered in light of the record made in the district court and the applicable case law.

[1] The parties have cited a number of cases which deal with this issue. A great percentage of these, however, involve factual situations quite different from the facts which exist in this appeal. Here, there is involved only one event, i.e., one parcel of real estate sold at a foreclosure sale for a price which is approximately 57.7 percent of the fair market value of the property. Is the price paid a "fair equivalent" for the transfer of the property? We hold that it is not.

The sale of real property was involved in one of the cases cited by

Durrett, Schafer v. Hammond, 456 F.2d 15 (10th Cir. 1972). There the Tenth Circuit affirmed a holding by the district court that a sale of real property for approximately 50 percent of its market value was void for lack of a fair consideration. Here, Mitchell paid slightly more than 50 percent (57.7%) for the property involved. The sale, however, deprived the bankruptcy estate of an equity in the property of $84,600.00, if computed on the $200,000.00 market value fixed by the district court.

We have been unable to locate a decision of any district or appellate court dealing only with a transfer of real property as the subject of attack under section 67(d) of the Act, which has

approved the transfer for less than 70 percent of the market value of the property.

Assuming, arguendo, that we should review the district court's conclusion of law as a finding of fact under the "clearly erroneous" standard, the results would be the same. We cannot affirm the district court on this issue. Our review of the entire evidence leaves us with a definite and firm conviction that the price which Mitchell paid for the property at the trustee's sale was not a "fair equivalent" for the property. Under such circumstances, it is our duty to declare the transfer voidable under section 67(d). See, United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542,

92 L.ed. 746, 766 (1948); George W. B. Bryson & Co., Ltd. v. Norton Lilly & Co., Inc., 502 F.2d 1045, 1049 (5th Cir. 1974). See also, Tulia Feedlot, Inc. v. United States, 513 F.2d 800, 807 (5th Cir., cert. denied, 423 U.S. 947, 96 S.Ct. 362, 46 L.ed.2d 281 (1975); Ealy v. Littlejohn, supra at 229 n. 30.

The defendant-appellee Mitchell seeks to sustain the final judgment of the district court on the ground that the transfer accomplished by the trustee pursuant to the power of sale provision of the deed of trust was not a transfer made by the debtor in possession within the contemplation of section 67(d). We find this position to be without merit.

The word "transfer" is defined in section 1 of the Act, 11 U.S.C. §1. Section 1 provides in pertinent part:

> The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:
>
> (30) "Transfer" shall include the sale and every other and different mode, direct or indirect, of disposing of or of parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or conditionally, voluntarily or

> involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor;

[2] The comprehensive character of this definition leads us to conclude that the transfer of title to the real property of the debtor in possession pursuant to an arrangement under Chapter XI of the Act, by a trustee on foreclosure of a deed of trust, to a purchaser at the sale constitutes a "transfer" by debtor in

possession within the purview of section 67(d). The actual transfer of title was made by Durrett to Fields, as trustee, via the deed of trust, executed April 7, 1969, to secure an indebtedness then owing to Southern and thereafter assigned to Washington. Possession of the property was retained by Durrett subject to the power of the trustee to sell and deliver possession of the property, on default, at a foreclosure sale. While the actual conveyance of title by Durrett was made on April 7, 1969, possession was retained until foreclosure of the deed of trust. The "transfer" within the contemplation of the Act, was not final until the day of the foreclosure sale, January 4, 1977. This was accomplished within the one-year

period provided by section 67(d)(2), 11 U.S.C. §107(d)(2). This conclusion is supported by reliable and ample authority. See 1 Collier on Bankruptcy, §1.30 at 130.28(2)(3) (14th ed. 1967), where it is said: "[t]he present definition covers not only alienations of title but includes surrender of possession". See also, 4 Collier on Bankruptcy, §67.29 at 471, et seq.

For the reasons herein given, the judgment of the district court must be vacated, and the cause reversed with directions.

Upon remand, the district court shall enter judgment for plaintiff-appellant, directing the rescission of the transfer under section 67(d) of the Act, dealing

with the property in such manner as will protect Mitchell's equity therein. Section 67(d)(6), 11 U.S.C. §107(d)(6).

JUDGMENT VACATED; REMANDED WITH DIRECTIONS.

APPENDIX D

HAROLD C. ABRAMSON, Trustee,
Plaintiff-Appellant,

v.

LAKEWOOD BANK AND TRUST COMPANY,
Defendant-Appellee.

No. 79-1592

United States Court of Appeals,
Fifth Circuit

June 10, 1981.

Trustee in bankruptcy brought suit to have foreclosure sale declared a fraudulent transfer under Bankruptcy Act. The United States District Court for the Northern District of Texas, at Dallas, Robert W. Porter, J., granted summary judgment for bank and refused to set aside alleged transfer, and trustee appealed. The Court of Appeals held that bank's nonjudicial foreclosure sale was a

"transfer" within meaning of Bankruptcy Act, and as transfer occurred within one-year period prior to date of filing of bankruptcy petition, it was subject to being set aside as fraudulent if it was made without fair consideration.

Reversed and remanded.

Thomas A. Clark, Circuit Judge, dissented and filed opinion.

Bankruptcy 165(3.2)

Bank's nonjudicial foreclosure sale was a "transfer" within meaning of Bankruptcy Act, and as transfer occurred within one-year period prior to date of filing of bankruptcy petition, it was subject to being set aside as fraudulent if it was made without fair consideration.

Bankr. Act, §§1(30), 67(d)(2), 11 U.S.C.A.§§1(30), 107(d)(2).

See publication Words and Phrases for other judicial constructions and definitions.

Philip I. Palmer, Jr., Dallas, Tex., for plaintiff-appellant.

Storey, Armstrong, Steger & Martin, William L. Bedard, Dallas, Tex. for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before GODBOLD, Chief Judge, SIMPSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

This is an appeal by Harold C. Abramson, acting as trustee in bankruptcy

under Chapter XI of the old Bankruptcy Act, [1] former 11 U.S.C. §1, et seq., of

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[1] The foreclosure sale of the property under attack here occurred August 3, 1976. Appellant filed a petition under Chapter XI of the Bankruptcy Act on February 24, 1977. Sec. 403(a) of Pub.L. No. 95-598, Title I (Nov. 6, 1978), 92 Stat. 2549 provides as follows:

> A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act [Pub.L. 95-598] had not been enacted, and the substantive rights of parties in connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

Since the events giving rise to this lawsuit occurred before the effective date of the new Bankruptcy Act the rights of the parties herein are governed by

the district court's order refusing to set aside an alleged transfer of real property within one year of the filing of debtor's bankruptcy petition. The district court granted summary judgment for the defendant-appellee, Lakewood Bank and Trust Company ("Lakewood Bank"), holding that the nonjudicial foreclosure sale of the debtor's land did not constitute a "transfer" within the meaning of §67(d) of the Bankruptcy Act. We reverse.

The facts can be stated briefly. The appellant, Abramson, brought this action in his capacity as court appointed trustee in the bankruptcy of Frank L. Johnson and

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"repealed Title XI." When reference is made in this opinion to the "Act" or the "Bankruptcy Act" this same shall refer to "repealed Title XI."

Nina P. Johnson. The appellee, Lakewood Bank, is a Dallas bank. The bankrupts owned seventy-three acres of land in Kaufman County, Texas. In August of 1975, the bankrupts borrowed $74,000 on an installment loan. This loan was secured by a conventional deed of trust in favor of the bank on the seventy-three acres.

The deed of trust was recorded by the bank on August 5, 1975. When the bankrupts were unable to fulfill their financial obligations to the Lakewood Bank, a foreclosure sale was held on August 3, 1976, at which time the Lakewood Bank, through its agent Louis McClain, purchased the property for $65,000 cash. At the time of the foreclosure sale, the bankrupts owed approximately $71,000 on

the mortgage. On February 24, 1977, the Johnsons filed a petition to be adjudicated bankrupt in the United States Bankruptcy Court for the Northern District of Texas.

The Trustee brought this action in March, 1978, to have the August, 1976, foreclosure sale declared a fraudulent transfer under §67(d) of the Bankruptcy Act. While the deed of trust had been executed more than one year prior to the date of the filing of the bankruptcy petition, the actual foreclosure sale occurred less than seven months before the filing. Section 67(d)(2) provided that "[e]very transfer made and every obligation incurred by a debtor within one year prior to the filing" of the

bankruptcy petition "is fraudulent. . . as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent." 11 U.S.C. §107(d)(2) (1966) (current version at 11 U.S.C. §548(a) (1978)) (emphasis supplied).

In granting summary judgment for the Lakewood Bank, the district court held that for purposes of the Bankruptcy Act, there was only one "transfer" in this case and that it "occurred at the latest on August 5, 1975, more than 18 months prior to the adjudication of bankruptcy."

More than a year after the issuance of the district court's ruling in the

Abramson case, this court of appeals decided the remarkably similar case of Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980). As to the narrow issue before us on this appeal, i.e., whether the bank's non-judicial foreclosure sale constitutes a "transfer" within the meaning of the Act, we consider the holding in Durrett as controlling.

The word "transfer" was defined in Section 1 of the Act as including:

> the sale and every other and different mode, direct or indirect, of disposing of or parting with property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein, absolutely or

> conditionally, voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment, payment, pledge, mortgage, lien, encumbrance, gift, security, or otherwise; the retention of a security title to property delivered to a debtor shall be deemed a transfer suffered by such debtor.

11 U.S.C. §1(30).[2]

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[2] The current version of the definition of transfer is located at 11 U.S.C §101(40):

> "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest.

In Durrett, this court held that a Texas non-judicial foreclosure sale constituted a transfer within the meaning of §67(d). There, a deed of trust to secure debt had been executed in 1969. In January, 1977, some nine days prior to the debtor's filing for bankruptcy, the trustee in the deed of trust sold the property at a non-judicial foreclosure sale as authorized by the deed of trust and Texas law. The debtor in possession under Chapter XI of the Bankruptcy Act brought a suit to set aside the sale of the property as a voidable transfer.

In considering whether the foreclosure sale was a "transfer" made by the debtor in possession, a panel of this

court set forth the definition of "transfer" and wrote:

> The comprehensive character of this definition leads us to conclude that the transfer of title to the real property of the debtor in possession pursuant to an arrangement under Chapter XI of the Act, by a trustee on foreclosure of a deed of trust, to a purchaser at the sale constitutes a "transfer" by debtor in possession within the purview of section 67(d). The actual transfer of title was made by Durrett to Fields, as trustee, via the deed of trust, executed April 7, 1969, to secure an indebtedness then owing to Southern and thereafter assigned to

> Washington. Possession of the property was retained by Durrett subject to the power of the trustee to sell and deliver possession of the property, on default, at a foreclosure sale. While the actual conveyance of title by Durrett was made on April 7, 1969, possession was retained until foreclosure of the deed of trust. The "transfer" within the contemplation of the Act, was not final until the day of the foreclosure sale, January 4, 1977. This was accomplished within the one-year period provided by section 67(d)(2), 11 U.S.C. §107(d)(2).

Durrett v. Washington National Insurance Co., 621 F.2d at 204.

Accordingly, the foreclosure sale of the Johnsons' seventy-three acres was also a transfer within the meaning of the Act. As this transfer occurred within the one-year period, it is subject to being set aside as fraudulent if it was made without fair consideration. Therefore we reverse and remand for further proceedings consistent with this opinion.

REVERSED and REMANDED.

THOMAS A. CLARK, Circuit Judge, dissenting:

I dissent. Although I recognize our panel is bound by Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), Durrett is simply wrong in its holding that a foreclosure sale is a

transfer within the meaning of §67(d). Subparagraph (2) of that section of the former Bankruptcy Act reads in part as follows:

> Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this title by or against him is fraudulent. . . if made or incurred without fair consideration by a debtor. . . without regard to his actual intent;. . .

11 U.S.C. §107(d)(2).

A foreclosure sale by a mortgagee or trustee is not a transfer by the debtor, although done in his name pursuant to a power of sale in the mortgage or deed of

trust. The debtor's act which triggers foreclosure is the failure to fulfill some obligation in the promissory note which is secured by the mortgage or deed of trust. The creditor than declares the obligation due, forecloses, and sells at a public sale to the highest bidder. The mortgagor-trustor/bankrupt does nothing but default--that cannot be translated into a "transfer." It is not a voluntary conveyance on his part. The power of sale vested in the mortgagee or trustee, when coupled with an interest as here, is a valuable property right acquired by that party at the time of the execution of the

initial mortgage or trust deed.[1] When that time is more than twelve months before the filing of the bankruptcy petition, the power of sale is vested absolutely in the mortgagee or trustee.

It is basic mortgage law that at the time of the foreclosure sale the purchaser (who may or may not be the mortgagee or trustee) takes the same title to the property which the mortgagor or trustor had at the time of the initial mortgage or

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[1] Technically a mortgage does not contain a power of sale, while a deed of trust or deed to secure debt does contain such a power. However, in common parlance the generic term "mortgage" embraces all forms of instruments creating a lien on realty for the purpose of securing a debt. Many contain powers of sale in order to avoid court proceedings which are necessary in strict mortgage states.

trust deed, subject only to property taxes (and perhaps some statutory intervening limitations as changes in zoning, etc., and the right of redemption by the mortgagee with a specified number of days granted statutorily in some states), and free and clear of any intervening liens or mortgages placed against the property by the debtor or any judgment creditor.

By our decision here and in Durrett we cast a cloud upon mortgages and trust deeds. Foreclosure within twelve months before a filing creates a sale voidable by the trustee in bankruptcy if the public sale did not bring a "fair consideration." It is generally known that such sales do not bring the best price, but most states, including Texas, mandate public sales when

foreclosure is the creditor's remedy. Many states, but not Texas, prohibit a deficiency judgment against the debtor unless the mortgagee obtains confirmation of the sale through a court proceeding where the fairness of the consideration is adjudicated.[2] Thus in those states a mortgagee who did not obtain judicial confirmation would be prohibited from filing a claim in the bankruptcy proceeding for the amount of the deficiency.

The cloud created over mortgages and trust deeds by making foreclosure sales subject to being voided by a bankruptcy

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[2] See, e.g., Ga. Code Ann. §67-1503 (confirmation of foreclosure sales under powers).

trustee will naturally inhibit a purchaser other than the mortgagee from buying at foreclosure. This tends to depress further the prices of foreclosure sales and thus increase the potential size of the deficiency in each foreclosure in all six states comprising this circuit.

It is interesting to me that Durrett is the first case treating this problem--after 90 years of bankruptcy law and mortgages of a time greater than the memory of man. It again establishes what an imaginative lawyer can do when he adds persuasion.

I would affirm.